TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 395.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED SEPTEMBER 7, 1906.

(20,360.)

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SUPREME COURT OF THE UNITED STATES

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In the Court of Appeals of the District of Columbia.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

a Supreme Court of the District of Columbia.

No. 24683. Criminal.

UNITED STATES
vs.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

1 & 2 *Indictment.*

Filed in Open Court April 3, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia, Holding a Criminal Term, January Term, A. D. 1905.

DISTRICT OF COLUMBIA, *ss:*

The Grand Jurors of the United States of America, in and for the District of Columbia, aforesaid, upon their oath do present:

* * * * * * *

3 *Third Count.*

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:

That on the twenty-third day of November, in the year of our Lord, one thousand, nine hundred and three, and at the District

aforesaid, said Andrew A. Lipscomb and said Thomas M.
4–13 Fields were receivers, that is to say, were receivers under a certain order of the supreme court of the District of Columbia, holding an equity court, dated the sixth day of November, in the year of our Lord, one thousand, eight hundred and ninety-four, in equity cause number fifteen thousand, nine hundred and seven, and entitled The Washington Beneficial Endowment Association *versus* The Commercial Alliance Life Insurance Company; that on the said twenty-third day of November, in the year of our Lord, one thousand, nine hundred and three, the said Andrew A. Lipscomb and said Thomas M. Fields, as such receivers, had possession of a certain other large sum of money, to-wit, the sum of fifteen thousand, nine hundred and seventy-four dollars and seven cents, which said fifteen thousand, nine hundred and seventy-four dollars and seven cents, in money of the value of fifteen thousand, nine hundred and seventy-four dollars and seven cents, being the property and moneys of the Washington Beneficial Endowment Association, a body corporate, had then and there come into such possession of them, the said Andrew A. Lipscomb and said Thomas M. Fields, by virtue of their office and employment as such receivers, and that they, the said Andrew A. Lipscomb and said Thomas M. Fields, so having the said fifteen thousand, nine hundred and seventy-four dollars and seven cents in their possession as aforesaid on the said twenty-third day of November in the year last aforesaid, and at the District aforesaid, and while they were such receivers as aforesaid, did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby then and there embezzle the same; against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

* * * * * * *

14 *Demurrer.*

Filed in Open Court, April 20, 1905. J. R. Young, Clerk

In the Supreme Court of the District of Columbia.

No. 24,683. Criminal Docket, No. —.

UNITED STATES
vs.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Separate Demurrer of Thomas M. Fields.

Comes here the defendant Thomas M. Fields, and, by leave of court first had and obtained, demurs specially and generally to the indictment in this cause filed, and to each and every count thereof, and says:—

1. That the said indictment is bad in substance.
2. That each and every count of the said indictment is bad in substance.

D. W. BAKER,
PHILIP WALKER,
Attorneys for Defendant Fields.

NOTE:—Among the matters of law intended to be argued and relied on, in support of the foregoing demurrer, are the following:

I. As to the indictment as a Whole, and to Each and Every Count Thereof.

a. No offence is charged under Section 841 of the Code of Law for the District of Columbia, or under any other law.

b. No description is given of the property, or of any property, of which the defendants are alleged to have been appointed receivers; nor are any facts alleged showing any connection between
15 such property and the money alleged to have been received by them; nor are any facts alleged showing any connection between such money and the receivership order alleged in the said indictment.

c. There is no direct allegation of the ownership of the alleged receivership property, or of the money alleged to have been received by the defendants.

d. There is no direct or specific allegation of the place where or the time when the alleged money or property came into the alleged possession of the defendants; nor is there any allegation of any facts showing that the said money was included in the receivership order alleged.

e. The facts alleged in the indictment do not show that the defendants ever had possession of the alleged receivership property or money, but only the custody thereof, if anything; the allegation of their alleged possession being merely an erroneous conclusion from the facts alleged.

f. The facts or particulars of the alleged receivership are not stated.

g. No facts or particulars are alleged to show that the defendants have converted or appropriated the alleged money to their own use, either fraudulently or unlawfully or otherwise; but only a mere conclusion is alleged.

h. There is no allegation of an intent to defraud; nor are any facts stated or direct allegations made showing any intent to commit any fraud in fact.

i. Neither said Section 841 of the said Code of Law for the District of Columbia, nor any other law, applies to receivers appointed before January 1, 1902.

16 *j.* The said Section 841 is unconstitutional and void, because the forfeiture clause thereof operates to deprive the citizens of their property without due process of law; it denies them the

equal protection of the laws; it inflicts cruel and unusual punishment; it takes private property for public or private use without compensation, and divests vested rights; especially so if given any retroactive effect.

* * * * * * *

D. W. BAKER,
PHILIP WALKER,
Attorneys for Defendant Fields.

17 *Order of Severance.*

Supreme Court of the District of Columbia.

TUESDAY, *April* 25, 1905.

The Court resumes its session pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

No. 24683. Violation Section 841, Code.

UNITED STATES
vs.
ANDREW A. LIPSCOMB.

Come as well the Attorney of the United States as the defendant in proper person, according to his recognizance and by his Attorneys Messrs. Holmes Conrad, W. Walton Moore and F. Edward Mitchell; whereupon the defendant's motion for a separate trial coming on to be heard, and argued by counsel, it is considered by the Court that said motion be and the same hereby is granted.

* * * * * * *

Order on Demurrer.

FRIDAY, *April* 28, 1905.

The Court resumes its session pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

No. 24683. Indicted for Violation Section 841, Code.

UNITED STATES
vs.
THOMAS M. FIELDS.

18 Come as well the Attorney of the United States as the defendant in proper person according to his recognizance and by his Attorneys Messrs. D. W. Baker and Philip Walker;

whereupon, the defendant's demurrer to the indictment coming on to be heard, and argued by counsel, it is considered by the Court, that as to Counts Nos. 4, 5, 7 and 8 of said indictment that said demurrer be and it hereby is sustained, and that as to Counts Nos. 1, 2, 3 and 6 that said demurrer be and it hereby is overruled and the defendant is ordered to appear before this Court to plead to Counts Nos. 1, 2, 3 and 6 of said indictment.

19 *Motion for Commission, &c.*

Filed in Open Court May 3, 1905; J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 24683, Criminal Docket No.—.

UNITED STATES
vs.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Comes here now the defendant Thomas M. Fields, and moves the court as follows:—

1. For a commission to examine as witnesses in his behalf upon interrogatories thereto annexed, William T. Gilbert and Henry D. Hotchkiss, both of whom are material witnesses for this defendant, and reside beyond the District of Columbia, in the City of New York, in the State of New York.

2. For letters rogatory to take the testimony of Charles F. Miller as a witness in behalf of this defendant upon interrogatories and cross-interrogatories filed in this court and transmitted by this court under said letters rogatory, the said Charles M. Miller being a resident of and now to be found in the City of London, England, and being a material witness for this defendant.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is one of the defendants in this cause, and the defendant named in the foregoing motion; that the said persons therein named are material witnesses for this defendant; that the said Henry D. Hotchkiss and William T. Gilbert reside beyond the District of Columbia, and are residents of the City of New York in the State of New
20 York; that the said Charles F. Miller resides and is now to be found in the City of London, England. That the address of the said Henry D. Hotchkiss is No. 35 Liberty Street, in said City

and State that the address of the said William T. Gilbert is No. 256 Broadway, in the said City and State; that the address of the said Charles F. Miller is care if R. Hooe & Co., London, England. That by the testimony of the said Hotchkiss and Gilbert, and by the documentary evidence to be produced by them and annexed to and made a part of their depositions, this defendant will prove that none of the persons or corporations named in the remaining counts of the indictment in this cause had any ownership in or of the money as alleged in the said indictment; that by the said Miller this defendant will prove that a large part of the said money lawfully passed into the exclusive manual custody and control of Andrew A. Lipscomb, named in the said indictment, for the sole purpose of *bona fide* investment thereof by him in certain safe securities, and that this defendant did not convert or appropriate the same or any part thereof to his own use; that the said indictment was only filed on April 3, 1905; that since that time this defendant has been fully engaged in the preparation of and effort to sustain his demurrer thereto; that this defendant desires a trial of this cause at as early a date as he can properly prepare his defense; that the present motion is made at the earliest practicable opportunity; that it is made in good faith and is not made for the purpose of delay; and that this defendant cannot safely go to trial without the testimony of each and all of the said witnesses.

THOMAS M. FIELDS.

Subscribed and sworn to before me this 3rd day of May, A. D. 1905.

IRWIN H. LINTON,
[SEAL.] *Notary Public.*

21 The United States will please take notice that the foregoing motion and affidavit will be presented to Criminal Court No. 1, on Thursday, May 4, A. D. 1905, at 10 o'clock A. M. or as soon thereafter as counsel can be heard.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

Service of a copy of foregoing motion, affidavit and notice is hereby acknowledged this third day of May, A. D. 1905.

MORGAN H. BEACH,
U. S. Attorney, D. C.

22 *Order Granting Motion for Commission.*

Supreme Court of the District of Columbia.

THURSDAY, *May* 4, 1905.

The Court resumes its Session pursuant to adjournment, Mr. Justice Wright, presiding.

No. 24683. Indicted for Violation Section 841, Code.

UNITED STATES
vs.
THOMAS M. FIELDS.

Come as well the Attorney of the United States as the defendant in proper person according to his recognizance and by his Attorneys Messrs. D. W. Baker and Philip Walker; whereupon the defendant's motion for a commission to examine as witnesses for the defendant upon interrogatories to be filed herein, William T. Gilbert and Henry D. Hotchkiss both residing in the City of New York, and for letters rogatory to take the testimony of Charles F. Miller, residing in London, England, a witness for the defendant upon interrogatories and cross-interrogatories to be filed herein; coming on to be heard, it is considered by the Court that said motion be and it hereby is granted, and Ordered that upon application of defendant, process issue commanding said William T. Gilbert and Henry D. Hotchkiss to appear at the trial of this case.

23 *Motion for Bill of Particulars, &c.*

Filed in open court May 4, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 24683. Cr. Doc. No.

UNITED STATES
v.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Comes here now the defendant Thomas M. Fields, and moves the court for an order requiring the plaintiff to furnish him a bill of particulars setting forth the details of the receivership order and property, and of the ownership and converting and appropriating, alleged in the indictment filed in this cause; and also setting forth how and when the alleged money or property came into the alleged possession of the defendants, and what connection if any, existed between the said money and the said receivership order and property; for that the

said matters and things are alleged only generally and inferentially in the said indictment, but are necessary to be known in detail to this defendant so that he may properly prepare his defense, and in order to avoid any liability to be surprised at the trial by evidence for which he may be unprepared.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is the defendant named in the foregoing motion; that the bill of particulars requested thereby is essential to enable him to
24 prepare properly for the trial of this case, and that without such particulars he is liable to be surprised and unprepared to meet the evidence that the plaintiff may offer at the trial, as he will not know until then what such particulars are. Affiant further says that the said motion is made *bona fide,* and not for the purpose of delay.

THOMAS M. FIELDS.

Subscribed and sworn to before me this Fourth day of May, A. D., 1905.

J. R. YOUNG, *Clerk,*
By J. W. LATIMER, *Ass't Clk.*

The plaintiff will take notice that the foregoing motion and affidavit will be called to the attention of Criminal Court No. 1 on Monday, May 8, A. D., 1905, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

Service of copy of foregoing motion, affidavit and notice acknowledged this Fourth day of May, A. D., 1905.

MORGAN H. BEACH,
U. S. Attorney, D. C.

25 *Motion for Return of Papers, &c.*

Filed in Open Court May 4, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 24683, Cr. Doc. No. —.

UNITED STATES
v.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Comes here now the defendant Thomas M. Fields, and moves the court for an order requiring the Attorney of the United States for the District of Columbia to return and restore forthwith to the office of the clerk of this court, and to the files of said office all of the original papers and records in Equity Cause, No. 15907, mentioned in the indictment in this cause filed, which papers and records the said Attorney now has and for some time past has had in his exclusive possession and control; for that it is highly necessary that the defendant and his counsel shall have access to and be permitted freely to examine and inspect the said papers and records in order to prepare properly for the trial of this case.

D. W. BAKER.
PHILIP WALKER.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is the defendant named in the foregoing motion; that upon information derived from the clerk of this court, and belief, the Attorney of the United States for the District of Columbia
26-35 has now, and for some time past has had, in his exclusive possession and control, all of the material papers and records in Equity Cause No. 15907, mentioned in the said indictment; that this defendant and his counsel desire to examine and inspect the said papers and records in a free, unembarrassed and lawful manner; that in order properly to prepare for trial, it is very necessary that this defendant and his counsel shall have access to and be permitted freely to examine and inspect the said papers; that they have a lawful and just right so to do; and that for these reasons the said papers should be returned at once to the clerk's office where they lawfully belong.

THOMAS M. FIELDS.

Subscribed and sworn to before me this Fourth day of May, A. D., 1905.

J. R. YOUNG, *Clerk,*
By J. W. LATIMER,
Ass't Cl'k.

The Attorney of the United States for the District of Columbia will please take notice that the foregoing motion and affidavit will be presented to Criminal Court No. 1 on Monday, May 8, A. D., 1905, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

Service of copy of foregoing motion, affidavit and notice acknowledged this Fourth day of May, A. D., 1905.

MORGAN H. BEACH,
U. S. Attorney, D. C.

* * * * * * *

36 *Motion for Continuance, &c.*

Filed in Open Court May 8, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 24683, Cr. Doc. No. —.

UNITED STATES
v.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Comes here now the defendant, Thomas M. Fields, and moves the court to continue the trial of this cause for a reasonable time, for the reasons set forth in the affidavit filed herewith as a part hereof.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says as follows:

That the indictment in this cause was only returned and filed on April 3, 1905; that on April 5, 1905, this defendant gave bail, and on April 17, 1905, pleaded the general issue thereto, with leave of court to withdraw his plea and demur; that at the same time the U. S. Attorney gave notice that he would call this case for trial immediately after another case set for April 25, 1905; that on April 20, 1905, this defendant withdrew his said plea, and demurred to the said indictment; that on April 21, 1905, the U. S. Attorney notified this

defendant's attorneys that he would call up said demurrer on
37 April 25, 1905; that on April 25, 1905, the hearing of said demurrer was postponed by consent of counsel until the next day; that on April 26, 1905, this defendant and his counsel appeared, prepared to present the said demurrer, but, at the instance of the U. S. Attorney, and by consent of counsel, the hearing was again postponed until April 28, 1905; that on said last-mentioned date the said demurrer was sustained in part and denied in part; that immediately thereafter this defendant's counsel gave notice in open court that they would apply to the Court of Appeals for a special appeal from that part of the order over-uling the said demurrer, upon the reconvening of that court on May 2, 1905; that, at the same time, the U. S. Attorney gave notice that he would call this case for trial on Monday, May 8, 1905; that on May 2, 1905, a petition and brief for such special appeal were duly presented to the said Court of Appeals, which petition was denied later in the same day; that on the next day, May 3, 1905, this defendant filed his motion and affidavit for an order for a commission and letters rogatory to take the testimony of certain material non-resident witnesses, two being in New York, and one in London, England; that on the following day, May 4, 1905, the said motion was granted; that on the said May 4, 1905, being Thursday, this defendant filed his motion and affidavit to require the U. S. Attorney to return to the office of the clerk of this court, the papers and records in Equity Cause No. 15907 recited in the said indictment; that at the same time this defendant also filed his motion and affidavit for a bill of particulars; that said two last-mentioned motions were noted for hearing on May 8, 1905, at 10 o'clock A. M., or as soon thereafter as counsel can be heard; that before 12
38 o'clock M. on May 6, 1905, this defendant's interrogatories under the said commission and letters rogatory were duly filed in the clerk's office, and copies thereof served on the U. S. Attorney; that this court was not in session on May 5 and 6, 1905; and that affiant hereby expressly refers to the said papers and proceedings in this cause, and makes the same part hereof.

Affiant further says that the proceedings aforesaid have required much time and labor of his counsel and himself; that many consultations have been held both day and night between said counsel and affiant regarding the details of the law and facts of this cause and by way of due preparation for hearing, and they have exercised the utmost diligence in the matter; but notwithstanding this, they are not at all properly prepared for trial on May 8, 1905.

Affiant further says that a distinct, positive and irreparable injury will be done him by forcing him to trial on May 8, 1905; that the testimony of his said non-resident witnesses is material to his defense, and he cannot safely go to trial without it; that it has required some time and effort on the part of affiant to locate Charles F. Miller, named in the said motion for letters rogatory, as the said Miller left this District in the year 1904 to go to Lisbon, Portugal, and, on information and belief, will not return until about two years from now; and that

the said Miller is not absent by any procurement or connivance of this defendant.

Affiant further says that he has already stated of record in this cause the specific facts which he expects to prove by the said Miller, and by Henry D. Hotchkiss and William T. Gilbert, who are
39 named in the said motion and affidavit of May 3, 1905, and he hereby again refers for this purpose, to his said motion and affidavit; that the said William T. Gilbert is the same William T. Gilbert named as receiver in the second count of the said indictment as the owner of the moneys therein alleged to have been converted; that by the said Hotchkiss and Gilbert affiant expects to disprove any evidence that the Government may offer tending to show that any of the persons or corporations named in the first, second, third and sixth counts of the said indictment had any owership or title or property or possession in, to or of the said moneys or any part thereof, either at the time laid in the said indictment or at any other time long prior thereto; and to prove the contrary of the allegations of the indictment as to ownership; and that whatever ownership or title or property or possession the said corporations and Gilbert ever had, ceased absolutely long before the date or dates of such ownership and converting as laid and has never since been reacquired in whole or in part by them or any of them; and that the persons named in the said sixth count never had any such ownership or title or property or possession whatever either on, or at any time prior to, the date or dates alleged in the said indictment. Affiant further says that the said Gilbert as receiver was a party to the said Equity cause No. 15907, and that the said Hotchkiss was of counsel for him therein; that affiant cannot meet the Government's proof of ownership of the Commercial Alliance Life Insurance Company or of William T. Gilbert, Receiver of said Company, as alleged in the first and second counts of the said indictment, by his own testimony or that of any witness resident in the District of Columbia, nor can he be safely or properly pre-
40 pared to meet any evidence on the part of the United States tending to prove the allegations of ownership in the third and sixth counts of the said indictment without the testimony of the said Hotchkiss and Gilbert; that affiant also expects to have produced and proved by them certain material documentary evidence bearing directly upon the question of ownership as alleged in the said four counts of the said indictment, which documentary evidence will be attached to and made part of their depositions and duly returned therewith; and that such parol and documentary evidence will be sufficient to overcome any evidence which the government may offer in support of any or all of the allegations of ownership in the said indictment; affiant being advised that said allegations are material.

Affiant further says that, as he has heretofore substantially stated of record in this cause, he expects to prove by the said Miller that a certain large part and specific sum of the moneys alleged in said indictment to have been converted, passed lawfully into the exclusive manual possession, custody and control of affiant's co-defendant on

or about June 20, 1903, for the sole purpose of *bona fide* investment thereof by said co-defendant in certain safe securities, and that the same never came into the exclusive possession or control of this defendant, and that this defendant did not convert the same or any part thereof to his own use—this proof to supplement other evidence proposed to be offered as to the lawful disposition of all of the moneys mentioned in the said indictment, so far as this defendant is concerned. Affiant further says that the said Miller is the only witness to corroborate this defendant as to the said part of the said moneys;

41 that the said testimony of the said Miller is especially material and necessary to this defendant for the reason that affiant's co-defendant has specifically stated and denied under oath, both in this case and in other proceedings, that he ever had exclusive possession or control or custody of any part of the moneys and sum mentioned in the said indictment, but that this defendant received and converted to his own use the whole thereof.

Affiant further says that he is advised that while it is proper that he should state herein the facts which he proposes to prove by his said non-resident witnesses, it is not necessary that he should recite at length the details of their evidence and of the documents tending to prove such facts; and affiant therefore refers for any such or further details, to his filed interrogatories to the said witnesses.

Affiant further says that the said testimony sought by the said commission and letter rogatory, is highly material to this defendant; that he has been guilty of no neglect, laches or delay in seeking said testimony; that it is relevant, competent, admissible and true, and can be had within a comparatively short time; that it is important and materially affects the innocence of this defendant; that it is not vague, nor remote, nor mere conclusion; that it is responsive, and consistent with affiant's defense; that none of said witnesses is incompetent; and that the denial of a continuance of this case until affiant can get the testimony of said witnesses will deprive him of a fair and impartial trial; that said commission and letters rogatory are compulsory process for obtaining witnesses in his favor, to which he is

42 entitled by the Constitution and laws of the United States; that to grant an order for such commission and letters rogatory without "reasonable time and opportunity to obtain the benefit of the same" is in effect a denial of defendant's right to compulsory process, and a nullification of any such order; that it is a human impossibility to have either the said commission or letters rogatory properly executed and returned by May 8, 1905—only four days after the order therefor, one of said days being a non-secular day and one-half or another being a legal half-holiday.

43 Affiant further says that by the said Gilbert and Hotchkiss among other things, he expects to prove that about eleven years ago the Washington Beneficial Endowment Association, named in the third count of said indictment, sold and by deed conveyed away absolutely all of whatever ownership, right, title and estate it ever had in the moneys and property mentioned in the said indict-

ment, and that it never thereafter reacquired the same or any interest therein; and that all of whatever ownership, right, title and estate the Commercial Alliance Life Insurance Company, named in the first count of said indictment, ever had in the said moneys and property absolutely passed away from said Company long ago, and that said Company never reacquired the same or any interest therein; and that all of whatever ownership, right, title and estate William T. Gilbert, Receiver of the Commercial Alliance Life Insurance Company, named in the second count of said indictment, ever had in the said moneys and property, was sold and conveyed away absolutely long ago to one Johnson, and that said Gilbert has never reacquired the same or any interest therein; and that affiant expects to produce or have produced by said witnesses and duly proved the said transfers; and that these acts and things occurred long prior to the date of the offense as alleged in the said indictment; and further that neither the persons nor corporation named in the sixth count of said indictment, nor any one of them, nor their alleged intestates, ever had any ownership, title, property or estate whatever in the said moneys or property at any time either on or prior to the date of the offense as laid in said indictment.

Affiant further says that immediately upon the return of said indictment he retained his present counsel in this case, and there has been no lack of diligence on affiant's part in this re-
44 spect.

Affiant further says that he has a good and valid defense to the said indictment; that the nature of a part of his defense is such that it will require a careful examination of an elaborate account beginning on or about November 6, 1894, and running from that date for about nine and one-half years; that it involves various witnesses and numerous material papers and transactions, both in and out of court; that many of such papers have become intermingled, through no fault of affiant, with a large mass of about twenty years' accumulation of other papers in other legal proceedings and affairs, and it will require some time and labor to find such papers required by affiant in this case; and that for this reason affiant has been unable to present or explain them to his counsel.

Affiant further says that the matters and things giving rise to the said indictment involve no less than six different suits in equity, and numerous different actions at law, and other proceedings in other courts; that the said equity suits are quite intricate, the equity cause mentioned in said indictment is very elaborate and highly complicated, and was instituted on or about October 6, 1894, and has been pending ever since; that said cause has been before the Court of Appeals three times, the Supreme Court of the United States once, and the Auditor of the court twice, with various results; that it is essential that affiant's counsel shall fully understand the details of all the said proceedings; that the U. S. Attorney has had all of the material papers and records in the said Equity Cause No. 15907 in his exclusive possession in his office ever since the said indictment

was returned, if not longer; that affiant and his counsel cannot properly prepare for trial without opportunity freely to inspect
45 and examine the said papers and records, as well as the papers and records in the other suits and actions and proceedings hereinbefore mentioned, which opportunity they have not had.

Affiant further says that another obstacle was an order of the U. S. Attorney to the Washington Loan and Trust Company (in which it will be claimed by the Government that the said moneys were) to seal and lock up closely certain checks and certificates of deposit alleged to be relevant, and the consequent action of said bank in following said order and in refusing to show such papers, and to give any information regarding them, to affiant or his counsel; that upon learning of such order from said bank one of affiant's counsel asked the U. S. Attorney for permission to inspect said checks and certificates and to get transcripts of the relevant ledger accounts in the hands of said bank, but the said U. S. Attorney replied that he preferred not to grant the request at that time, and to let it wait awhile, and accordingly it was not pressed; that only very recently has one of affiant's attorneys been permitted to see said checks and certificates in said bank, although it is necessary to the due preparation of this case for trial that affiant and his counsel shall know the details of said checks, certificates and accounts; and especially so as the said checks do not belong to the said bank and were not placed or left in its hands for the purpose of being used as evidence against him in this or any other judicial proceeding.

Affiant further says that the hereinbefore recited preliminary proceedings in this cause have occurred with such unusual haste and rapidity that they have occupied substantially all of the time which affiant or his counsel could possibly have given to this
46 case; that much time and labor was conscientiously devoted to the said demurrer, and that reasonable time and opportunity are now required to prepare the case for trial on the facts; that affiant's counsel do not yet know of the material facts or the details of such facts in this case, as neither affiant nor they have had any reasonable time to collect them or the parol and documentary evidence to support them.

Affidavit further says that since said indictment was filed he has been compelled to give some of his time and attention to calls made on him for papers and other information required in other proceedings pending in this and other local courts; that affiant has devoted on an average not less than fifteen hours per day to this case ever since the said indictment was rendered, and, on more than one occasion, twenty-four hours of the day; and, since said indictment was filed, it has been necessary for him to be absent twice from this District for several days, once in New York and once in Philadelphia, regarding this case.

Affiant further says that if said Hotchkiss and Gilbert were summoned to this District as witnesses in his behalf it would require some short time for them to produce the documentary evidence

required by them, as shown by the aforesaid interrogatories to be propounded to them.

In conclusion affiant says that this application for continuance is made in good faith, and not for the purpose of delay; and that this defendant desires a trial as soon as he reasonably can prepare for it.

And further affiant saith not.

THOMAS M. FIELDS.

Subscribed and sworn to before me this Eighth day of May, A. D., 1905.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, Jr., *Ass't Clk.*

47 DISTRICT OF COLUMBIA, *ss:*

Daniel W. Baker and Philip Walker, being first duly sworn, depose and say that they have carefully read the foregoing affidavit of Thomas M. Fields; that the matters and things therein stated in relation to them or either of them are true; that they are not prepared for trial of this case on May 8, 1905, although they have devoted all the time and attention to it that they reasonably could; that they have exercised unusual diligence in this cause and a reasonable continuance is absolutely necessary in order to prepare properly for trial; and that without such continuance they can be of no substantial service to the said defendant on a trial on May 8, 1905.

And further affiants say not:—

D. W. BAKER.
PHILIP WALKER.

Subscribed and sworn to before me this eighth day of May, A. D. 1905.

J. R. YOUNG, *Clerk*,
By R. J. MEIGS, Jr., *Ass't Clk.*

48 *Affidavit of U. S. Attorney as to Custody of Certain Papers.*

Filed in Open Court May 8, 1905. J. R. Young, Clerk.

Supreme Court of the District of Columbia.

MAY 8TH, 1905.

No. 24683.

U. S.

vs.

THOMAS M. FIELDS.

DISTRICT OF COLUMBIA, *ss:*

Before the undersigned personally appeared Morgan H. Beach who being first duly sworn, deposes and says:

I am the United States Attorney in and for the District of Columbia, have read the affidavit of the defendant Thomas M. Fields filed this day for continuance: and deny that the defendant or any of his counsel have been denied access to any of the court records or proceedings in the cause in which the defendant was receiver: it is true that I have had such papers in my public office for some time past, but this was because they were needed there in preparing this case for trial and further because some of the papers had been lost or abstracted when they were in the file room of the Court; that the defendant and his Attorneys have been afforded all proper and reasonable facilities for examining said papers in the office of this affiant.

MORGAN H. BEACH.

Subscribed and sworn to before me this 8th day of May, 1905.
J. R. YOUNG, *Clerk.*
By F. W. SMITH,
Ass't Clerk.

49 *Motion for Return of Papers, &c. Overruled.*

Supreme Court of the District of Columbia.

MONDAY, *May* 8, 1905.

The Court resumes its Session pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

No. 24683. Indicted for Violation Section 841, Code.

UNITED STATES
vs.
THOMAS M. FIELDS.

Come as well the Attorney of the United States as the defendant in proper person according to his recognizance and by his Attorneys Messrs. D. W. Baker and Philip Walker; and, thereupon, the defendant's motion to require the Attorney of the United States to return to the Clerk of this Court the original papers in his possession in Equity Cause No. 15907 coming on to be heard, and argued by counsel, it is considered by the Court that said motion be and it hereby is overruled; whereupon the defendant's motion to require the Attorney of the United States to furnish him with a bill of particulars coming on to be heard, and argued by counsel, it is considered by the Court that said motion be and it hereby is overruled; and, thereupon, the defendant's motion for a continuance of this case coming on to be heard, and argued by counsel, it is considered by the Court that said motion be and it hereby is overruled; whereupon for plea to said indictment as to Counts Nos. one (1), two (2), three (3) and six (6) the defendant says that he is not guilty in

manner and form as charged therein and for trial puts him-
50 self upon the country and the Attorney of the United States doth the like; and, thereupon, the said defendant being called for trial, it is ordered that a jury be empannelled and the members of the regular Petit jury being called, the panel is exhausted by reason of challenges without completing the jury; and, thereupon, the Court orders the Marshal to summon a talesman from the bystanders, and the Marshal summons Richard M. Lawrenson who, being a good and lawful man of the District of Columbia, being sworn upon his *voir dire*, and examined as to his competency as a juror, the panel is complete, which is as follows:

Charles L. Howard	Edgar C. Blackman	William H. Linger
Hiram R. Biddle	Charles Specht	Charles Linger
W. T. Brooke	Robert D. Howell	Harry T. O'Hara
Ernst L. Hibbs	Herman J. Waltz	Richard M. Lawrenson

who, being sworn well and truly to try the issue herein joined as to said Counts Nos. One (1), two (2), three (3) and six (6), after hearing the evidence in part, are respited until the meeting of the Court to-morrow.

Memorandum.

May 10, 1905.—Summons issued for George H. Tichenor and Daniel McConville witnesses for the defendant and Marshal's return of same date "not to be found."

51 *Verdict, &c.*

Supreme Court of the District of Columbia.

MONDAY, *May* 15, 1905.

The Court resumes its Session pursuant to adjournment, Mr. Justice Wright, presiding.

No. 24683. Indicted for Violation Section 841, Code.

UNITED STATES
vs.
THOMAS M. FIELDS.

Come again the parties aforesaid in manner as aforesaid and the jury that was respited on Friday last; and, thereupon, after arguments of counsel and charge by the Court the jury, upon their oath say, that the defendant is guilty in manner and form as charged in the third (3d) Count of said indictment, but not guilty as charged in the first (1st) second (2d) and sixth (6th) Counts thereof; whereupon the Attorneys for the defendant move the Court to fix the amount of the bail in this case, which motion is granted, and said bail is fixed in the sum of Ten thousand dollars ($10,000); and

thereupon, the defendant enters into a recognizance in the sum of Ten thousand dollars ($10,000) with *The Title Guaranty and Trust Company of Scranton, Pa.* as his Surety approved by the U. S. Attorney, for his said defendant's appearance in this Court from day to day during the present and its subsequent — and hear and receive the sentence of the Court in this case to be pronounced when required, or, if he depart the Court without leave.

The talesman sworn in this case is discharged from further service during this term of the Court and the Marshal is ordered to pay him the lawful fees for his attendance as certified to by the Clerk.

52 *Motion in Arrest of Judgment.*

Filed in Open Court May 19, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Criminal. No. 24683.

UNITED STATES
vs.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Motion in Arrest of Judgment.

Comes here now the defendant Thomas M. Fields, and moves the court to arrest the judgment on the verdict in this cause for the reasons following, among others:—

1. Because of fatal defects apparent on the face of the third count of the indictment in this case, which defects have been specifically stated in clauses A to J, both inclusive, of paragraph I of this defendant's demurrer thereto filed herein on April 20, 1905, which part of said demurrer is hereby referred to and made a part hereof for a specific statement of such defects.

2. Because Code Sec. 841 is unconstitutional and void in that it attempts to make a receiver or other fiduciary guilty of embezzling his own property, by forfeiting all right or claim to any vested commissions, costs and charges, and declaring him guilty of embezzlement of the entire amount or value of the money or other property coming into his possession.

3. Because the third count of the said indictment fails to allege that this defendant ever qualified as a receiver under the order therein recited.

4. Because the third count of the said indictment fails to show that the court had jurisdiction to pass the order therein alleged.

53 5. Because of other defects apparent on the face of the third count of the said indictment.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

The Attorney of the United States for the District of Columbia will take notice that the foregoing motion will be called to the attention of Criminal Court No. 1 on Friday, May 26, 1905, at 10 o'clock A. M. or as soon thereafter as counsel can be heard.

D. W. BAKER,
PHILIP WALKER,
Attorneys for the said Defendant.

Service of copy of foregoing motion and notice acknowledged this nineteenth day of May, 1905.

MORGAN H. BEACH,
U. S. Attorney, D. C.

K.

54 *Motion for New Trial.*

Filed in Open Court May 19, 1905. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Criminal. No. 24683.

UNITED STATES
vs.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Motion for New Trial.

Comes here now the defendant Thomas M. Fields, and moves the court to set aside the verdict against him in this cause and to grant a new trial, for the reasons following, among others:—

1. Because of the defendant's exceptions duly taken to:—

A. The rulings of the court on the defendant's motions for (1) a bill of particulars; for (2) the return to the clerk's office of the papers and records in Equity Cause No. 15907; and for (3) a continuance.

B. The rulings of the court on the defendant's objections to the evidence.

C. The rulings of the court on the defendant's objections to the conduct of the United States Attorney.

D. The rulings of the court in refusing the defendant's prayers.

E. The rulings of the court in granting the Government's prayers.

F. Other rulings of the court.

2. Because the verdict is contrary to the law.

3. Because the verdict is contrary to the instructions of the court,

and specifically defendant's prayers Nos. VII, X and XII, which were granted by the court.

55 4. Because the verdict is contrary to the evidence.

5. Because the verdict is contrary to the weight of the evidence.

6. Because secondary evidence of the alleged certificate of incorporation of The Washington Beneficial Endowment Association was admitted, over this defendant's objection, when no sufficient foundation for such secondary evidence had first been laid, and the Attorney for the United States had the paper purporting to be the original certificate of such incorporation in his actual and exclusive possession and control throughout the entire trial and for about two months prior thereto, and no proof whatever was offered of the execution of the said original certificate, nor of the correctness of such secondary evidence.

7. Because of improper conduct of the United States Attorney in stating to the court that said original certificate had been lost and in offering evidence tending to satisfy the court of such loss, and in offering and using secondary evidence thereof when he knew or should have known that the paper purporting to be the original certificate was then, and for some time past had been, in his own possession; and in arguing to the jury that this defendant forged his co-defendant's name to the certificate of deposit of November 8, 1901, when all the evidence proved the contrary; and in charging in argument that this defendant had robbed widows and orphans while asserting at the same time that the moneys involved were the property of the said Association and not of any widows and orphans; and in arguing that this defendant was a receiver of said Associa-

56 tion's property, whereas the order of appointment and all the other evidence in the case showed that if this defendant was a receiver at all he was a receiver of the property of the Commercial Alliance Life Insurance Company and not of the said Association; and in the repeated use of highly intemperate language against this defendant not based on the evidence; and in the said Attorney's vigorous defense of Mr. Lipscomb; all to the unjust prejudice of this defendant.

8. Because no legally sufficient or proper evidence was offered to prove that this defendant ever gave the bond expressly required by the order of appointment put in evidence, without which bond this defendant never became a receiver; the primary evidence being the original bond itself.

9. Because the evidence offered in this case shows that the court had no jurisdiction to pass the said order of appointment, or any of the other orders and decrees put in evidence in this cause; whereas the contrary should have been shown.

10. Because the Government was permitted to give evidence of numerous distinct acts of the defendant, each alleged to constitute embezzlement, and was not required to elect, and did not elect, to rest on any specific act and sum and date, and no conspiracy or sys-

tematic plan on the part of this defendant was either averred or proved in relation to the moneys mentioned in the indictment; and

11. Because the Government was allowed to give evidence tending to show that the specific sum charged against the defendants in the indictment was a mere balance left of various sums (proceeds of sale of realty, rentals, interest, proceeds of sale of personalty, assessments, etc.) received by the defendants at various times from different persons, part of which ($10,070.82) they had paid over.

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12. Because of fatal variance between the allegation that moneys were converted and the evidence tending to show that only checks or certificates of deposit, if anything, were converted.

13. Because much evidence was admitted under the four counts, and the case argued to the jury on the two counts, and then submitted to the jury on only one count, whereas much of such evidence and argument would have been wholly inadmissible if the case had been tried on the one count only, and was highly prejudicial to the defendant; and because much evidence exceedingly prejudicial to the defendant was admitted to show alleged conversions more than three years before the finding of the indictment and prior to January 1, 1902.

14. For other reasons to be stated at the hearing.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

DISTRICT OF COLUMBIA, *ss:*

Thomas M. Fields, being first duly sworn, deposes and says that he is the defendant named in the foregoing motion; that during the trial of this case this defendant did not recall that he had ever seen the original paper purporting to be the certificate of incorporation of the Washington Beneficial Endowment Association, or that the said certificate ever had been filed in Equity Cause No. 15907 mentioned in the indictment herein, but he was of the impression that only copies of it had been filed in that cause, as recited in the various pleadings therein, including the original bill received in evidence in this case; that during the night of the day the verdict in this case was rendered he looked carefully through the printed record in that case for other matters, and in reading over the deposition therein of one Lawrence Gardner, claiming to be a former president of the said Association when in existance, and a witness in that cause, found it stated that the said Gardner produced the said paper purporting to be the original certificate and that it was filed with his deposition on June 3, 1895,—nearly ten years ago. On the next day, May 16, 1905, this defendant asked Mr. Hawken, the file clerk of this court, for Mr. Gardner's deposition, to which the said file clerk replied that it was with all the other papers in the case, which the United States Attorney then had and had had for about two months in his office.

58

At this defendant's request said clerk then went with affiant to said United States Attorney's Office, where said clerk quickly found said deposition with the other papers in that case, and upon examination, said paper purporting to be the said original certificate was found attached to said deposition, which was very near the top of the papers in a box in which said papers were kept. Neither affiant nor his counsel had any reasonable time or opportunity to examine any of said papers before or during the trial, except, during the trial, only those which were identified and those which were offered in evidence, all the papers in said cause other than those put in evidence having been kept in his own close custody by the United States Attorney, and daily brought to this court from and returned to his office at the opening and adjourning of this court during the trial; and that under the circumstances recited it was the right of this defendant to have the primary evidence against him, of which he was deprived by the aforesaid conduct of the
59 United States Attorney.

And further affiant saith not:—

THOMAS M. FIELDS.

Subscribed and sworn to before me this nineteenth day of May, A. D. 1905.

WILLIS W. PARKER,
Notary Public.

[SEAL.]

DISTRICT OF COLUMBIA, *ss:*

Philip Walker, having been first duly sworn, deposes and says, that he is one of the defendant's attorneys in this case; that this affiant, both before and during the trial of this case, did not recall that he had ever seen the original paper purporting to be the certificate of incorporation of the Washington Beneficial Endowment Association, nor that it had ever been filed in Equity Cause No. 15,907 mentioned in the indictment; nor does this affiant now recall such facts, although he has been informed since the trial, and now believes, that said paper was in fact filed in said cause, in which for a time he was the solicitor for certain claimants therein, though he took no active part either in the preparation or hearing of said cause. Affiant further says that he had no reasonable time or opportunity to study this cause or to examine any of the papers in said cause prior to or during the trial, except only, during the trial, those which were put in evidence, and those which were identified.

And further affiant saith not:

PHILIP WALKER.

Subscribed and sworn to before me this nineteenth day of May, A. D. 1905.

NORTON M. LITTLE,
Notary Public, D. C.

[SEAL.]

60 DISTRICT OF COLUMBIA, *ss:*

D. W. Baker, being first duly sworn, deposes and says that he is one of the defendant's attorneys in this case; that this affiant had no knowledge or information regarding the paper purporting to be the original certificate of incorporation of the Washington Beneficial Endowment Association, either before or during the trial of this cause; that he had no reasonable time or opportunity to examine any of the papers in Equity Cause No. 15907 before or during the trial of this case, except, during the trial, only such as were put in evidence and those which were identified. Affiant further says that he was not connected with said Equity Cause No. 15907 in any manner, and knows but very little about it, and most of that he learned during the trial of this case.

And further affiant saith not.

D. W. BAKER.

Subscribed and sworn to before me this nineteenth day of May, A. D. 1905.

J. R. YOUNG, *Clerk,*
By HARVEY GIVEN,
Asst. Clerk.

The Attorney of the United States for the District of Columbia will take notice that the foregoing motion and affidavits will be called to the attention of Criminal Court No. 1, Mr. Justice Wright presiding, on Friday, May 26, 1905, at 10 o'clock A. M., or as soon thereafter as counsel can be heard.

D. W. BAKER,
PHILIP WALKER,
Attorneys for said Defendant.

Service of copy of foregoing motion, affidavits and notice acknowledged this nineteenth day of May, A. D. 1905.

MORGAN H. BEACH,
K.
United States Attorney, D. C.

61 *Affidavit in Support of Motion.*

Filed July 21, 1905.

In the Supreme Court of the District of Columbia.

Criminal. No. 24683.

UNITED STATES
vs.
ANDREW A. LIPSCOMB and THOMAS M. FIELDS.

Affidavit of James S. Easby-Smith, Assistant Attorney of the United States in and for the District of Columbia.

James S. Easby-Smith, first being duly sworn, deposes and says, he is one of the assistant attorneys of the United States for the District of Columbia, and assisted in the prosecution of the above-entitled cause; that in the course of his preparation of the case he went to the office of the Recorder of Deeds of the District of Columbia and there had search made for the original certificate of incorporation of the Washington Beneficial Endowment Association; that he found that the said certificate had been filed and recorded in said office, but was missing from its place in the files; that for some time prior to the trial of said cause all the papers in the case of the Washington Beneficial Endowment Association *versus* The Commercial Alliance Life Insurance Company, Equity No. 15,907, and cases consolidated therewith, were in the possession of the United States attorney, said papers being very great in number and bulk and filling a two bushel box; that before discovering that the
62 aforesaid certificate of incorporation was missing from the files of the Recorder's Office affiant had made a careful examination of all the papers in said equity causes, and after said discovery, and upon being advised by several members of the bar of the District of Columbia that in all probability the original certificate of incorporation aforesaid would be found among the papers in said equity causes he made another very thorough and careful examination of all of said papers, but was unable to find said certificate; that among said papers are four bound books of testimony before the Auditor and certain examiners in chancery; that affiant not only looked through said bound books of testimony but read a great portion of same, especially those portions consisting of the testimony of the defendant Lipscomb, and the defendant Fields; but did not read all of said testimony and did not turn over every page in each of said books of testimony; that on the day following the verdict of guilty against the defendant Fields affiant was informed that said Fields had found the original certificate of incorporation aforesaid among the papers in said equity causes, which

had been in the possession of the United States attorney, and that upon being directed to the place where said certificate was found by said defendant Fields affiant found what appears to be the original certificate of incorporation filed as an exhibit, and bound into one of said books of testimony in connection with the testimony of Lawrence Gardner; that affiant did not know at any time before he found the said certificate, in the manner stated, that said certificate was among the papers in the possession of the United States Attorney.

Affiant further says that both before the trial of the defendant Fields, and during the trial, which occupied more than a
63 week, counsel for the defendant, and the defendant himself, were not denied access to the said papers, and were at liberty to examine them at any time they desired.

JAMES S. EASBY-SMITH,
Assistant Attorney of the United States in and for the District of Columbia.

Subscribed and sworn to before me this 26th. day of May, 1905.
J. R. YOUNG, *Clerk*,
By F. W. SMITH,
Ass't Clerk.

Motions (2) *Overruled, Sentence, &c.*

Supreme Court of the District of Columbia.

FRIDAY, *July* 28, 1905.

The Court resumes its Session, pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * * * *

No. 24683. Convicted of Violation Section 841, Code D. C.

UNITED STATES
vs.
THOMAS M. FIELDS.

Come as well the Attorney of the United States as the defendant in proper person according to his recognizance and by his Attorneys Messrs. D. W. Baker and Philip Walker; whereupon the defendant's motion in arrest of judgment and motion for a new trial coming on to be heard, and argued by counsel, it is considered by the Court that said motions be, and they hereby are overruled;
64 and, thereupon it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing, except as he has already said; whereupon it is considered by the Court that for his said offense the defendant be taken by the Warden to the United States jail in and for the District of Columbia, thence to the Peni-

tentiary (as designated by the Attorney General of the United States) there to be imprisoned, and kept at labor for the period of five (5) years, to take effect from and including the date of his arrival at said Penitentiary; and, thereupon, the defendant by his Attorney notes an appeal to the Court of Appeals of the District of Columbia, from the judgment of the Court in this case; whereupon the defendant by his Attorneys moves the Court to fix the amount of the bond for costs on said appeal, which motion is granted, and said bond is fixed in the sum of one hundred dollars ($100) and, the Attorney of the United States in open Court waives the issuance of a writ of Citation; and, thereupon, the defendant by his Attorneys moves the Court to fix the amount of the bail in this case which motion is granted, and said bail is fixed in the sum of five thousand dollars ($5000); whereupon, the defendant enters into a recognizance in the sum of *Five thousand dollars ($5000) with the Title Guaranty and Trust Company of Scranton, Pa.* as his surety approved by the Court, if the said defendant fail to forthwith surrender himself to the custody of the Marshal of this District to be dealt with and proceeded against according to law in case the judgment appealed from shall be affirmed, or the appeal for any cause dismissed, or the judgment be reversed and a new trial ordered, or, if the said defend-
and depart the Court without leave; and, thereupon, the
65 defendant by his Attorneys submits to the Court his bill of exceptions taken during the trial of this case which is taken by the Court under consideration.

Memorandum.

August 17, 1905.—Appeal bond $100 with The Title Guaranty and Trust Co. of Scranton, Pa., as Surety Filed.

Prolongation of Term, &c.

Supreme Court of the District of Columbia.

TUESDAY, *September* 19, 1905.

The court resumes its Session pursuant to adjournment, Mr. Chief Justice Clabaugh, presiding.

* * * * * * *

No. 24683. Convicted of Violation Section 841, Code.

UNITED STATES
vs.
THOMAS M. FIELDS.

Upon motion of the defendant by his Attorney F. J. Hogan, Esq.,
it is by the court ordered that the April Term A. D. 1905 of
66 this Court be, and it is hereby prolonged for the period of thirty eight (38) days for the purpose of settling the bill of

exceptions in this case, and further Ordered that the time for filing the transcript of the record on appeal in the Court of Appeals of the District of Columbia be, and it is hereby extended to and including November 15, A. D. 1905.

* * * * * * *

NOVEMBER 10, 1905.

No. 24683. Convicted of Violation Section 841, Code D. C.

UNITED STATES
vs.
THOMAS M. FIELDS.

Now comes here the defendant by his Attorney Frank J. Hogan, Esq., and prays the Court to sign, seal and make a part of the record his bill of exceptions taken during the trial of this case and submitted to the Court on July 28th, 1905, now for then, which is done accordingly.

67 *Bill of Exceptions.*

Filed November 10, 1905.

In the Supreme Court of the District of Columbia.

Criminal, No. 24683.

UNITED STATES
v.
ANDREW A. LIPSCOMB, THOMAS M. FIELDS.

Be it remembered that this cause came on for further hearing on May 8, 1905, at 10 o'clock A. M., before Criminal Court No. 1, Mr. Justice Wright, presiding; whereupon the defendant, Thomas M. Fields, presented to the court his motion and affidavit filed herein on May 4, 1905, for an order requiring the Attorney of the United States for the District of Columbia to restore forthwith to the clerk's office of this court all of the original papers and records in Equity Cause No. 15,907, mentioned in the indictment in this cause, it appeared by agreement of counsel that upon last Thursday the U. S. Attorney had invited the Defendant and his attorney to examine the papers at any time in his office. The U. S. Att'y states that he needs the papers in evidence and that counsel or defendant will be given them in any place where their loss will be guarded against; (D. T. W.) whereupon the court overruled the said motion, and the defendant duly noted his exception 1 to such ruling, as follows:

The COURT: This motion with respect to the restoration of the paper to the clerk's office is overruled. If counsel for the defendant will specify any particular paper or papers which
68 they desire amongst the papers which are in the possession of the District Attorney, such papers will be ordered into their possession and they may copy them; but so far as ordering indiscriminately and unidentified, a lot of papers out of the possession of the District Attorney is concerned, I do not think the motion should go that far.

Mr. BAKER: We only ask for the papers in the case. We do not ask for any private paper which the District Attorney may have in regard to this cause.

The COURT: The papers in the files of the Court are the papers you refer to?

Mr. BAKER: Yes.

Mr. EASBY-SMITH: There is a bushel-basket of them.

The COURT: My desire is not to subject the papers to loss. If counsel will designate any particular papers that they want to obtain copies of or inspect so that the District Attorney may keep track of the papers, that may be done; the counsel may examine the papers, as the District Attorney suggests, at any time they want; but I do not think counsel ought to take such an assortment of papers out of the custody of the District Attorney.

Mr. BAKER: We note an exception to the ruling of the Court.

Thereupon the said defendant presented to the court his motion and affidavit filed herein on May 4, 1905, for an order requiring the Government to furnish him with a bill of particulars; to the consideration of which motion the U. S. Attorney objected on the ground that he had not had two clear days' notice of such motion; but the court requested to hear the point of the motion and after
69 hearing the said motion read and argued, declined to grant it, because the court concluded that it was without merit; and then the said objection was by the court sustained; to which ruling of the court the defendant duly noted his exception 2. Then the said defendant presented to the court his motion and affidavits filed herein on May 8, 1905, for a continuance, but the court overruled the said motion, and the defendant duly noted his exception 3 to such ruling. Thereupon the said defendant was arraigned and pleaded not guilty to the first, second, third and sixth counts of the said indictment. The said defendant then moved the court to continue the case because the commission and letters rogatory, ordered on May 4, 1905, to be issued, had not been returned; the court tendered to the defendant compulsory process to secure the attendance of said witnesses; of which the defendant declined to avail himself; (D. T. W.) thereupon the court denied such motion; to which denial the defendant duly noted his exception 4. Thereupon a jury was empaneled and sworn to try the issues joined on the said counts between the United States and the

said defendant. The U. S. Attorney then opened to the Jury, but the defendant made no opening to the jury at any time.

In order to maintain the issues on its part joined, the United States then offers as a witness SAMUEL MCCOMAS HAWKEN, who, being first duly sworn, testifies that he is an assistant clerk of this court in charge of the files; that he has known the defendant for about eight years as a member of the bar of the Supreme Court of the District of Columbia; that all the papers filed in Equity Cause No. 15,907 have for about two months last past been in a box in the U. S. Attorney's office; that he recognizes the paper now shown
70 him, purporting to be a bill in equity, as one of said papers. The said paper is offered in evidence, and is as follows in substance.

An original bill in equity of The Washington Beneficial Endowment Association complainant, against the Commercial Alliance Life Insurance Company, a corporation organized under the laws of the State of New York, defendant, filed October 6, 1894, in the Supreme Court of the District of Columbia, alleging that on August 9, 1894, in pursuance of a prior agreement entered into between them, the complainant sold and conveyed to the defendant, all of the former's property and effects, consisting of its life insurance business and the good will thereof, and all the personal, mixed, and real estate then owned by the complainant, the said real estate consisting of premises No. 419 Tenth street, northwest, Washington, D. C., and being more particularly described as the north one-half of lot 11 in square 378; that complainant transferred and set over said real estate to defendant by deed "duly recorded in the Land Records of the District of Columbia, in Liber 1937, at folio 141;" that said sale and conveyance were procured by defendant's false and fraudulent representations as to its financial status; that the defendant was to issue in lieu of complainant's certificates of endowment, policies of insurance of the defendant for equal amounts; and that the defendant was to hold said real estate in trust for and subject to prior claims of certain beneficiaries named in said certificates of endowment, and to keep and operate an office and place of business for such purpose in the District of Columbia. The bill prays "that a decree may be passed annulling
71 the transfer of plaintiff to the defendant of all its property and the deed of its real estate as aforesaid and the same reconveyed by the court to the plaintiff;" and for process, injunction, receiver, and general relief. The bill also alleges that the Washington Beneficial Endowment Association, the complainant, is a corporation and was duly incorporated under the laws of the District of Columbia, on April 2, 1877, for the purpose of carrying on the business of life insurance; and that a copy of the certificate of incorporation is attached to and made a part of the bill, as is also a copy of the certificates of endowment issued by the said complainant to the insured.

The said witness then identified a paper shown him, purporting

to be an order, as another of said papers; and the same is offered in evidence, and is as follows:

Order Appointing Andrew A. Lipscomb, Thomas M. Fields, Receivers.

Filed November 6, 1894.

In the Supreme Court of the District of Columbia.

In Equity. No. 15907, Docket No. 37.

THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION
vs.
THE COMMERCIAL ALLIANCE LIFE INSURANCE COMPANY.

Upon consideration of the motion of the complainant in this cause for the appointment of a receiver of the property involved in these proceedings and after due arguments—It is by the court, this 6th day of November, A. D. 1894, ordered that the said motion be, and it is hereby, granted, and that Andrew A. Lipscomb and Thomas M. Fields be, and they are hereby, appointed receivers to take
72 charge, custody, control and possession of all the property, real, personal, and mixed, including all books, documents, papers, vouchers, bills and correspondence, of any and every description and kind, which have been signed, conveyed, transferred or set over to the respondent The Commercial Alliance Life Insurance Company, by The Washington Beneficial Endowment Association, as fully set forth in these proceedings, and to hold the same subject to the further order of the court in the premises.

Before entering upon the performance of the trusts, hereby reposed in them, the said Andrew A. Lipscomb and Thomas M. Fields shall each file herein a bond with good and sufficient surety or sureties, to be approved by the court, conditioned for the faithful performance by each of them of his duties as such receiver, in the penal sum of twenty thousand ($20,000.00) dollars.

It is further ordered that the respondent, its agents, and attorneys be, and they and each of them are and is hereby required and commanded to forthwith deliver to the said receivers upon demand, all of the property and assets and documents as aforesaid, upon their qualifying as aforesaid, and they and each of them are and is hereby enjoined from in any manner interfering with the same or with the said receivers in connection with or concerning the same.

By the Court:

W. S. COX, *J.*

To the said order the defendant objected because it was passed before the Code D. C. took effect; because of variance between
73 it and the indictment in that the indictment charges that the defendants were receivers of money while the order shows

that they were not receivers of any money but of property, real and personal, and not the proceeds of it, which proceeds are not treated of by the Code; but the court overruled the objection and admitted the said order in evidence; and the defendant duly reserved his exception 5 to such ruling.

The said witness then identified as another of said papers a paper shown him, purporting to be an order passed in said equity cause on December 1, 1894, directing that the defendants in this case proceed "to sell at public sale all the real and personal property in their possession except the books, papers, and documents, the said real estate being described as the north half of original lot" 11 in square 378; and the said order was then offered in evidence.

To the said order of sale the defendant objected because it shows property coming into the hands of the receivers before the Code went into effect; because it is dated December 1, 1894; and because it shows on its face that the property is real estate, or part of it, and therefore not the money alleged in the indictment; but the court overruled the objection, and admitted the said order in evidence; to which ruling the defendant duly reserved his Exception 6.

Then the said witness identified as one of said papers another paper shown him, purporting to be a report of sale, filed May 13, 1895, by the defendants herein, reciting that they had sold the real and personal estate to James L. Norris for $22,210.00. The said report was then offered in evidence. The defendant objected to it for the reasons stated in his Exception 6; but the court overruled the objection and admitted the said report in evidence; to which ruling the defendant duly reserved his Exception 7.

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The said witness then identified as another of said papers a paper shown him, purporting to be an order *nisi* passed May 13, 1895, ratifying the sale recited in the said report of May 13, 1895, and the said order *nisi* was then offered in evidence; to which the defendant objected for the reasons stated in his Exception 6, because it is irrelevant and immaterial; because it does not relate to the property described in the indictment; because there is nothing to show that the receivers had any connection with the paper or anything to do with it; because this paper, the order *nisi*, states the price for which the property was sold, and is not competent as showing a fact of that kind; but the court overruled the objection and admitted the said order *nisi* in evidence; to which ruling the defendant duly noted his Exception 8.

The said witness then identified as others of said papers two papers shown him, purporting to be orders passed June 14 and 24, 1895, finally ratifying the sale of realty and personalty recited in the said report of May 13, 1895; and the said orders were then offered in evidence; to which the defendant objected for the reasons stated in his Exceptions 6 and 8; but the court overruled his objection and admitted the said orders in evidence; to which ruling the defendant duly took his Exception 9.

The said witness then identified as one of said papers another

paper shown him, purporting to be a decree, which was then offered in evidence, without objection, as tending to show a reference to the auditor, only; and which is in full as follows:

75 In the Supreme Court of the District of Columbia.
Equity. No. 15907.

THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION
vs.
THE COMMERCIAL ALLIANCE LIFE INSURANCE COMPANY.

Equity. No. 15809.

ROBERT BALL ET AL.
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

Equity. No. 16072.

JAMES S. EDWARDS, Administrator,
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

Equity. No. 16165.

MAN S. QUARLES, Administrator,
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

The above causes, by the orders of this court heretofore consolidated, came on to be heard together by consent of all parties thereto at this term and were argued by counsel, and, upon consideration thereof, it is, this 27th day of June, A. D. 1896, adjudged, ordered, and decreed as follows:

First. That the deed from the complainant, The Washington Beneficial Endowment Association, to the defendant, The
76 Commercial Alliance Life Insurance Company, bearing date August 9th, A. D. 1894, set out and involved in these proceedings, be, and the same hereby is, set aside and held for naught.

Second. That the net proceeds of the real estate described in said deed, sold under the authority and direction of this court by the receivers appointed in said cause No. 15,907, and who are impleaded in certain of the other causes so as aforesaid consolidated therewith, be, and the same hereby are, declared, held, and decreed to be liable only for the payment of the claims under the certificates issued by the complainant, the said endowment association mentioned in the proceedings in said causes, in such shares and proportions as this court may, by its further decree, determine, upon the filing of the report of the auditor, as hereinafter provided.

Third. That said causes be, and the same hereby are, referred to the auditor of this court to state the account of said receivers and to report—after such notice to all concerned as he may determine—the claims under said certificates involved in these proceedings and such other similar claims under other certificates isued by said endowment association as may be submitted to or brought before him under this reference entitled to payment out of or from said net proceeds of the said sale and the several sums to which such claimants are entitled to be paid therefrom. For this purpose the auditor will consider the testimony heretofore taken in said causes and such other testimony as any of said claimants may produce before him.

Fourth. And the auditor shall also report as to such rea-
77 sonable costs, if any, in the causes consolidated including counsel fees, as, in his opinion, may be a proper charge upon the fund in question.

W. S. COX, *J.*

The said witness then identified as another of said papers a paper shown him, purporting to be a report of the defendants herein, filed March 20, 1897, as to the deposit of the said proceeds with the Washington Loan and Trust Company, at interest pending appeal; and also another paper shown him, purporting to be an order passed March 20, 1897, in said equity cause, authorizing and approving such deposit; and said report and order were then offered in evidence; to which and each of which the defendant objected for the reason that the said report and order preceded the Code; but the Court overruled his objection and admitted the said papers in evidence; to which ruling the defendant duly reserved his Exception 10.

The said witness then identified as being among said papers, but not filed in the clerk's office, three papers shown him, purporting to be reports of the defendants, dated, respectively, December 19, 1899, January 19, 1900, and July 5, 1900, and purporting to be signed by the defendants. The said witness identified this defendant's signature thereto as genuine. The said report of December 19, 1899, is followed by a statement of account charging the defendants with $24,456.83 gross proceeds of sale, rentals and interest, and crediting them with $4,608.55 for costs, charges, and commissions. The said report of January 19, 1900, refers to said report of December 19, 1899, and charges them with additional interest debit of $105.27, and credits them with $10.53 commissions. The said report
78 of July 5, 1900, refers to said two former reports, and charges the defendants with $20,211.47 as of and to July 5, 1900, for proceeds of sale, rentals, and interest, and credits them with $1017.89 for costs, charges, and commissions, leaving a net balance of $19,193.58 chargeable against them. The said three reports were then offered in evidence; to which and each of which the defendant objected because there is nothing to show that they are court papers and parts of the record in this equity cause; because it is a statement in regard to money that came into the defendant's hand prior to the

Code; and because they antedated the Code and the period of the statute of limitations; but the court overruled the objection and admitted the said reports in evidence; to which ruling the defendant duly reserved his Exception 11.

The said witness then identified as one of the said papers another paper shown him, purporting to be an Auditor's Report, filed July 31, 1900, which report is a follows in substance:

The Auditor states the receivers' account and the distribution under the said decree of June 27, 1896, and reports that said Association, in the course of its existence, acquired the said real estate; that before or about August 9, 1894, said Association entered into an agreement with said Commercial Alliance Life Insurance Company, of New York, to convey to said Company the personal property, business and good will thereof, and the real estate and all the effects real, personal, and mixed, of said Association; that said Association executed a deed of conveyance on August 9, 1894, by which it granted and conveyed to said Company the said real estate, being the north half of lot 11 in square 378, in this city; that the
79 sum paid by said Company to said Association as the consideration for said deed was $14000; that on August 30, 1894, Robert Ball and two others filed their bill in Equity Cause No. 15,809 against said Association, Lawrence Gardner, and said Company, reciting that complainants were certificate-holders in said Association, alleging the said agreement and transfer, that the same were a fraud on complainants and other like certificate-holders, and that the defendants thereby became trustees of said property for complainants; that said Association and Gardner answered this bill, admitting the conveyance of said real estate to said Company by deed of August 9, 1894; that in the meantime said Association filed a bill in Equity Cause No. 15,907 against the said Company alleging said agreement and conveyance, and asserting that said deed was procured by defendant by false and fraudulent representations, and praying that the said conveyance may, by decree of the court, be annulled, and the property reconveyed to the plaintiff; that subsequently petitions for leave to intervene were filed by various certificate-holders or creditors of the said complainant association; that said decree of June 27, 1896, does not include the personalty or its proceeds; that the intervenor Stuart, "distinctly recognizes the validity of the transfer to the Commercial Alliance Insurance Company, and counts upon the undertaking of that Company to hold the property in trust for her claim and that of all other beneficiaries under endowment certificates having liens by virtue of the by-laws;" that said Company purchased the said property, and not the stock, of said Association; that with the said $14000, the proceeds of its said sale, the
80 said Association redeemed and extinguished all of its outstanding stock; "that at the entry of the judgment (of Stuart against said Association on October 1, 1894) the Beneficial Endowment Association was not an existing corporation; that it was dissolved by the transfer of all of its property, assets, and business, and

by the fact that there was at that date neither stock of the Association nor stockholders; * * * that the stockholders parted wih the ownership of the stock on the 9th of August (1894), and, as the Association could not hold it, the inevitable result was its immediate extinguishment. It follows as a necessary consequence that the corporation was dead. It could not exercise any corporate function. It could not sue or be sued. No process of any kind could be served upon it. All suits against it abated, and with them the suit of Mrs. Stuart. I am reminded that in these consolidated cases the Association has been recognized by the courts as capable of suing and being sued. The want of such capacity by the civil death of the corporation was not made manifest to the court until the cases were submitted for adjudication. The condition was only developed in the proof then presented. Then the court had in the combination of suits sufficient proper parties, complete pleadings and satisfactory proof to sustain its jurisdiction and decree;" and that the distribution in Schedule B is at the rate of .0875%.

Schedule A of said report charges the defendants herein with $24,415.13 gross proceeds of sale, rentals, and interest, and credits them with $9,324.39 for costs, charges, and commissions, leaving a balance of $15,090.74 for distribution to creditors of said Association.

81 Schedule B thereof distributes this balance to about one thousand different creditors of said Association, including the four named in the sixth count of said indictment, in various sums varying from a minimum of 22 cents to a maximum of $618.99.

The said report was then offered in evidence by the prosecution who stated that it was offered for the purpose of showing the amount with which the Auditor charged the receivers on that date, which balance they subsequently charged themselves with in an additional supplemental account. The offer was made in these words: "We offer this paper, it being the report of the Auditor filed July 31, 1900." (by Mr. Easby-Smith, Assistant U. S. Attorney.) to which the defendant objected because it contains findings of facts by the Auditor, and the court withheld its ruling on the objection "for the time being."

The said witness then identified a paper shown him as another of said papers, purporting to be an Auditor's Report, filed December 7, 1903, by Schedule A of which the defendants in this case are charged with the said $15090.74 and in addition an interest debit of $1,532.26; and are credited with additional costs, charges, and commissions, amounting to $746.43; leaving a balance of $15,876.57 for distribution. Schedule B thereof distributes this whole balance to the four parties named in the sixth count of said indictment, in the following proportions and priorities: Henry Ann Stuart, $9,924.95; Howard L. Morrison, Administrator of Zephyrine A. Morrison, $3,150.65; May M. Cassin, Administratrix of William D. Cassin, $2,237.27; Virginia Trust Company, Administrator of Alfred Shields, the remainder of the fund, $563.70. The said report

82 was offered in evidence, the same, other than the said Schedules A and B thereof, being as follows in substance:

The Auditor restates "the account and distribution in accordance with the opinion of the Court of Appeals." He refers to and adopts Schedule A of his Report of July 31, 1900, as corrected by his Supplemental Report of September 24, 1900. He says: "The opinion of the Court of Appeals leaves that part of the said report confirmed by the decree of this court undisturbed, and without restating that schedule I refer to it as part of this report. For the statement of distribution I take the balance shown by Schedule A of the first said report as amended by the supplemental report. The Court of Appeals, in the conclusion of its opinion, used the following terms: 'In consequence of the failure of the Auditor to allow the claim of Mrs. Henry Ann Stuart a priority over those of the other certificate holders, and the approval of his report in this regard by the Supreme Court of the District of Columbia, we think there was error in the decree of that court in the premises for which it should be reversed.'" The Auditor then reports that the same principle which gives priority to the Stuart claim also applies to the Morrison, Cassin and Shields claims; and so distributes the whole balance to them, after crediting the receivers with their expenditures for storage, costs of appeal, auditor's fees, clerk's costs, and other items. The Auditor also quotes that part of the opinion of the Court of Appeals which holds that the other certificate holders of said Association are entitled beyond question to the remainder of the fund after payment of the Stuart claim.

83 The said witness then identified as of said papers certain other papers then shown him, purporting to be as follows: Decree, passed May 5, 1904, overruling exceptions to Auditor's Report of December 7, 1903, and ratifying the same; Decree passed March 23, 1903, on Mandate of Court of Appeals, D. C.; Mandate of Court of Appeals, D. C. of May 20, 1899; Mandate of Court of Appeals D. C. of March 3, 1903; and order passed June 7, 1901, overruling exceptions to Auditor's Report of July 31, 1900, and ratifying the said report, and supplemental account of the receivers dated November 23, 1903, bearing the genuine signature of the defendant.

The United States then offered as a witness in its behalf, Dr. YOUNG, Secretary of the Franklin Fire Insurance Company, who, having been duly sworn, identified two checks then shown him, drawn by the said Franklin Fire Insurance Company on June 28, 1895, to the order of the defendants herein as receivers on the National Bank of the Republic, one being for $21,228.15 for balance due for said realty and the other for $4.95 for balance due on adjustment of rentals thereof, both of said checks purporting to have been endorsed by the defendants and paid by the said Bank. The witness was then asked if he knew that there was a president of a company known as the Washington Beneficial Endowment Association, with its place of business at No. 419 Tenth st., N. W., to which he replied: "I know nothing of the organization as a corporation, but its place of business was No. 419 Tenth St., N. W."

The defendants' endorsements of said two checks were then proved, and said checks were offered in evidence without objection thereto. (D. T. W.)

84 Here the following occurred: Mr. EASBY-SMITH: I show you the two checks of the Franklin Fire Insurance Company and ask you to state whether or not they are the signatures of Andrew A. Lipscomb and Thomas M. Fields?

The WITNESS: I would state that those are their signatures, judging from the handwriting.

Mr. BAKER: I believe it was understood yesterday that all this evidence showing the receipt of money, or anything showing the receipt of money prior to the going into effect of the Code is subject to our exception.

The COURT: You reserved your exception?

Mr. BAKER: We except to counsel asking the witness, Mr. Parker, in regard to the checks of June 28, 1895, the two checks of that date, and also ask the court to strike out the testimony of Dr. Young in regard thereto.

The COURT: The checks are already admitted without objection.

Mr. BAKER: We object to the testimony of Dr. Young, on the ground that it shows, if anything, the receipt of money prior to the Code going into effect.

The COURT: That is the same point that was discussed yesterday. The motion is overruled.

Mr. BAKER: We note an exception. (11 A.)

The Government then offered evidence showing that with said checks the defendants opened an account as receivers in the West End National Bank of July 6, 1895.

The Government put in evidence the ledger entries of said West End National Bank account, showing that on March 17, 1897, the defendants had a balance there to their credit, which balance was paid out on three checks, payable to the Washington Loan

85 and Trust Company; which checks were put in evidence; that with these checks the defendants purchased two time certificates of deposit from said Trust Company, dated March 17, 1897; that thereafter, from time to time, they renewed said certificates, receiving in all fourteen certificates by way of renewal; that the first ten certificates were in their joint names as receivers, and the last six, beginning August 25, 1900, were in their joint personal names; that with proceeds drawn from one of said renewal certificates in their names as receivers, they opened an account No. 22,990 as receivers in said Trust Company on August 25, 1900, which account was paid out on eight checks for certain sums on certain dates, as shown by the ledger entries of said account; that on November 8, 1901, with proceeds drawn from one of said renewal certificates in their personal names they opened another account, No. 27,260, in their personal names in said Trust Company, which account was paid out on twenty four checks for certain sums on certain dates, as shown by the ledger entries of said account; that thereafter, with

a check on said account No. 27,260, bearing the genuine signatures of both defendants, another account No. 35,191 was opened in said Trust Company in the name of the defendant "for Lipscomb and Fields," which account was paid out on twenty-six checks for certain sums on certain dates, twenty of which postdated the indictment date, as shown by the ledger entries of said account and the checks against it, and five of which were apparently negotiated and cashed outside of the District of Columbia, as indicated by the endorsements thereon. Said ledger entries show the dates and amounts of deposits and payments, but not the dates of checks or the payees or
86 endorsers. Eight checks on said account No. 27,260, and the said twenty-six checks on said account No. 35,191, were then put in evidence by the Government.

The Government also produced the deposit slips relating to said accounts, and proved each of the same to be in the handwriting of some certain clerk in said Trust Company, and then offered the same in evidence; to which the defendant objected as not competent evidence against him, nor binding on him, without any evidence showing that he was a party thereto; but the court overruled the objection on the Government's offer to prove that the defendant had checked against such accounts; to which ruling the defendant duly reserved his Exception 12. The Government subsequently produced witnesses who testified that the entries in said accounts in the bank books of the said Trust Co. and the writing on the said deposit slips of said acounts were in their respective handwriting and true (D. T. W.); and the Government also subsequently proved that the defendant had checked against said accounts.

The Government also showed that on fifteen certain dates between March 17, 1897, and June 23, 1903, defendants drew fifteen certain sums for certain of said certificates. Fourteen of said certificates and seventeen of said checks, and twelve of said withdrawals, were prior to January 1, 1902. Certain of said withdrawals were deposited on the same dates to the credit of one or the other of said accounts Nos. 22,990 and 27,260; and the amounts of two certain other withdrawals, and of some of said checks, agree with the particular amounts of certain credits allowed the defendants by the Auditor in his said reports; but certain of said
87 withdrawals, and some of said checks, do not correspond with any credits allowed by the Auditor or claimed by the defendants, none of said check- against said account No. 22,990 was drawn to the order of the defendant, except one dated August 25, 1900, which was payable to him as Solicitor for Wm. T. Gilbert, Receiver, for $210.00, the proceeds of the sale of the personalty. Of the said checks against said account No. 27,260, one of April 15, 1903, for $248.43 was drawn to the order of the defendant as Solicitor for Wm. T. Gilbert, Receiver, for costs of appeal; and nine were payable to him directly, and endorsed by him and paid over the bank counter in cash without further endorsement. On one of said certificates of deposit, dated Nov. 8, 1901, and in the personal names

of the defendants, and matured Nov. 8, 1902, the defendant endorsed said Lipscomb's name on Nov. 11, 1902, in the defendant's usual handwriting, and without any attempt at simulation; and on the following day said Lipscomb personally endorsed the said certificate. Subsequently said Lipscomb expressly verified to Parker, Treasurer of said Trust Company, that the defendant Fields had authority to sign his, Lipscomb's, name to checks relating to their accounts in said Trust Company, and specially ratified all checks to which said Fields had signed his, said Lipscomb's name, being four in all and *a* amounting in all to $1850.00. On each of said four checks the defendant, after having signed said Lipscomb's name thereto in the defendant's usual handwriting and without any simulation, wrote immediately after said Lipscomb's name, in the same handwriting, the letter "F," being the initial letter of the defendant's surname. On November 12, 1902, the defendant, referring
88 to his endorsement of said Lipscomb's name on said certificate of November 8, 1901, stated to one Eckloff, cashier of the Second National Bank, in the presence and hearing of said Lipscomb: "I had the power to do it; it is all right;" to which statement said Lipscomb made no reply. The last three checks on said account No. 27,260, and all of those on said account No. 35,191, were left in said Trust Company, but the defendant could have had the books balanced and the checks delivered to him at any time he wished prior to this prosecution. The said accounts were carried on openly and without any concealment. To all and each of said deposit slips, certificates of deposit, withdrawals, and checks, not in the names of the defendant as receivers, the defendant objected for that reason; and to them and each of them, he also objected as relating to property which came into possession before the Code was passed; but the court overruled the objection and admitted the same in evidence; to which ruling the defendant duly noted his Exception 13. The Government offered no evidence tending to show any conversion at one time and in one lump sum of the $15,974.07 mentioned in the indictment, nor of any conversion on November 23, 1903, the date of the offense alleged therein. One of said checks, against said account No. 27,260, was for $1300, and dated September 8, 1903, from which the signatures had been cut off; and another of said checks was for $1200 and dated June 20, 1903, from which the signature other than the defendant's had been cut out. All checks on said account No. 27,260 after August 8, 1903, bore the genuine signatures of both defendants. Said Parker testified that said Trust
Company delivered said last mentioned two checks together
89 with prior checks against said account, to either Mr. Lipscomb or Mr. Fields, in unmutilated condition. The U. S. Attorney here stated, in answer to a question by defendant's counsel, that all of the checks which he has put in evidence other than the said last three on said account No. 27,260, and the said twenty-six on said account No. 35,191, were received by him from said Lipscomb, and that they were then in the same condition in which they were when

offered in evidence in this case. The court ruled out all the endorsements on all of said checks on said account No. 35,191, other than the defendant's, because no evidence was offered to prove the same. One of said checks against said account No. 35,191 for $500 also bears the genuine signature of the defendant Lipscomb. Said Eckloff, in answer to a question by the U. S. Attorney as to whether he knew anything about the Washington Beneficial Endowment Association, testified that he knew that there was such an Association in existence here at one time; that he does not know that it existed in November, 1902; that it did business at one time; that he knew Mr. Gardner, its President; that he never had a policy, but paid other policies and paid Mr. Gardner; that it first did business on F. street; and he believes then it moved to No. 419 Tenth street, N. W.; that he paid other people's premiums for them; that it was in 1879 or 1880 when he was there and knew it was doing business, and when he met Mr. Gardner whom he has not met since; that he does not know when it ceased business, but understood that it had ceased; and that he does not know Mr. Gardner is dead.

The said Parker and Eckloff were called by the Government as its witnesses, and were duly sworn and testified as such.

90 The aforesaid ledger entries were made by various bank employees from the original deposit slips and checks in the usual course of the bank's business.

As to the last twenty of the said twenty-six checks against said account No. 35,191 the following occurred:

Mr. EASBY-SMITH: We now offer all these checks in evidence.

Mr. BAKER: We object to those checks on the ground that they are all dated after the day alleged in the indictment; that all except one appear to be the checks of Thomas M. Fields for Lipscomb and Fields; and there is no evidence to show that the money represented by these checks came into the possession of the defendant other than before the Code went into effect. And, on the further ground, we object that the indictment alleges the embezzlement of a certain sum of money on a certain day; and if the Government expects to use these checks, and show embezzlement on different days, we object to them on that ground because the indicement alleges but one offense, and the Government should not be permitted to prove any number of alleged acts of embezzlement under an indictment which alleges the embezzlement of a lump sum on a particular day.

The COURT: The objection is overruled.

Mr. BAKER: We note an exception. (14.)

The Government then presented as a witness in its behalf, Walter A. Pinchback, who, having been first duly sworn, testified that he is employed in the office of the Recorder of Deeds. The witness then produced and identified a book from said office, called Acts of Incorporation No. 2. Folio 165 of said book purported to be a record of a certificate of incorporation of the Washington Beneficial Endowment

Association; and the same was then offered in evidence; to
91 which the defendant objected because no law required such certificate to be recorded in said office, nor made such record primary evidence of the existence, contents, or execution of the original. The court sustained the objection on the ground that it is against public policy to remove public records from their place of lawful custody, for the purpose of using them as evidence.

The Government then offered a certified copy of the aforesaid record of the certificate of incorporation of the said Association, to which the defendant objected, because no law authorized or required such certificate to be recorded in the office of the Recorder of Deeds; and the objection was sustained.

The said PINCHBACK then testified, upon recall, that said copy was made from said record; that he had searched for the original certificate in the files where it ought to be kept and could not find it; that a series of books was in the office of the Recorder of Deeds, called Acts of Incorporation; that he does not know what period they cover; and that he has been in said office since November, 1891, off and on. The court then sustained the objection to said copy, and the U. S. Attorney said: "We will withdraw that feature of the case for the present."

The Government then again recalled said Pinchback, who produced and identified book No. 1, called Acts of Incorporation, from the office of the Recorder of Deeds, and testified that it starts May 23, 1870; and the said book was then offered in evidence; to which the defendant objected because the book itself is not competent, as far as the issue involved is concerned, and as to the existence of this
92 corporation, which by law is required to be kept; but the court overruled the objection, and admitted the said book in evidence; to which ruling the defendant duly reserved his Exception 15.

The Government then called as its witness Col. SCHAYER, who, having been duly sworn, said that he was in the Recorder of Deeds' Office for thirty odd years all told; that he was first there from April, 1869, to the fall of 1886; and then from 1890 to 1903; that in said office was kept a series of libers called Acts of Incorporation; that they were kept under the general Incorporation Act of Congress; that the custom was to record all certificates whether required by law to be recorded or not, and then to return them to the persons who brought there the record receipt; that a ruling of the office required them to be copied; that he knows the handwriting of the copyist who made the said liber copy of the certificate of the said Association; that the said copyist is dead; and that it was the duty of the assistant clerk to make this copy in the said liber and compare it with the original. The U. S. Attorney then stated that the original certificate of incorporation of said Association was lost; that diligent search had been made for it, and that it could not be found; and he then offered the said liber copy as secondary evidence of the original; to which testimony of Col. Schayer the defendant objected as incompetent and immaterial, and to which copy he objected be-

cause no proper foundation for secondary evidence had been laid; and because the loss of the original certificate had not been proved; and the defendant also objected to the acknowledgment of said copy because the execution of the original had not been proved; and because said copy does not prove the execution of the original; but the court overruled the objection, and admitted the said testi-

93 *court overruled the objection, and admitted the said testi*mony and copy in evidence; to which ruling the defendant duly reserved his Exception 16. The U. S. Attorney said: "Remember, we are not offering the record as a record that is required to be kept by law." This statement was made just before the court overruled the defendant's said objection. The said copy is as follows:

This is to certify that under the provisions of an act of Congress entitled "An Act to provide for the creation of corporations in the District of Columbia by general law," the undersigned hereby agree to become a body corporate, under the name of the Washington Beneficial Endowment Association, for the purpose of providing an endowment fund to be paid to the persons entitled thereto *who* upon the death of the party named in the certificate of endowment.

The existence of said corporation to be perpetual and the capital stock ten thousand dollars, divided into two hundred shares of fifty dollars each.

The concerns of the corporation for the first year to be managed by the following named trustees, viz: Robert B. Donaldson, Noble D. Larner, William H. Goods, Robert Ball, Alexander Gardner, George B. Clarke, Thomas J. Luttrell, Charles E. Prentiss, and Isaac L. Johnson.

The office of the corporation to be kept in the city of Washington, District of Columbia.

In witness whereof we have hereunto set our hands and seals this second day of April, A. D. 1877.

R. B. DONALDSON.	[SEAL.]
NOBLE D. LARNER.	[SEAL.]
W. H. GOODS.	[SEAL.]
ROBERT BALL.	[SEAL.]
ALEX. GARDNER.	[SEAL.]
GEO. B. CLARK.	[SEAL.]
THOS. J. LUTTRELL.	[SEAL.]
C. E. PRENTISS.	[SEAL.]
I. L. JOHNSON.	[SEAL.]

Witness:
S. C. MILLS.

94 DISTRICT OF COLUMBIA, *County of Washington, ss:*

I, Sam'l C. Mills, a notary public in and for the county and District aforesaid, do hereby certify that Robert B. Donaldson, Noble D. Larner, William H. Goods, Robert Ball, Alexander Gardner, George B. Clarke, Thomas J. Luttrell, Charles E. Prentiss, and Isaac

L. Johnson, parties to a certain instrument in writing bearing date on the second day of April, A. D. 1877, and hereto annexed, personally appeared before me in the county aforesaid, and, they being personally well known to me to be the persons who executed the said instrument of writing *and* acknowledged the same to be their act and deed.

Given under my hand and seal this second day of April, A. D. 1877.

SAM'L C. MILLS.
[NOTARIAL SEAL.] *Notary Public.*

The United States then called as its witness Dr. R. B. DONALDSON, who, having been duly sworn testified that he is the same R. B. Donaldson who was one of the incorporators of the Washington Beneficial Endowment Association; and then he was asked by the Government when the said Association was incorporated; to which the defendant objected, but the court overruled the objection; to which ruling the defendant duly noted his Exception 17. The witness then answered that he believed said Association was incorporated in 1873; and that he was one of the incorporators and was president for it for about twelve years; that there was a secretary and a treasurer; that it first met in Alexander Gardner's studio, and
95 then on Tenth street where the building was that the company occupied until its dissolution, the same building he thinks, now occupied by the Franklin Fire Insurance Co., that by dissolution he means when the company closed up and went out of business, that it carried on life insurance business; that he ceased to be president about three or four years before its dissolution; that the company was closed up and went out of business about 1893; and that the company has not carried on any business since 1893 to his knowledge. The witness also testified that he was not a stockholder in the company in 1893 or 1894.

The Government then offered in evidence a certified copy of a deed in fee simple from Bacon and Larner, Trustees to the Washington Beneficial Endowment Association, dated September 16, 1889, and recorded the same date in Liber 1421, Folio 278 *et seq.*, one of the Land Records of the District of Columbia, purporting to convey the north one-half of original lot 11, in square 378, to said Association; to which deed the defendant objected, on the ground that the deed itself does not necessarily show that any title passed by it; but the court overruled the objection, and admitted the said copy in evidence; to which ruling the defendant duly noted his Exception 18.

The Government then offered in evidence a certified copy of a deed in fee simple from the said Washington Beneficial Endowment Association to the "Commercial Alliance Life Insurance Company of the State of New York, a body corporate," dated August 9, 1894, and recorded August 10, 1894, in Liber 1937, Folio 141, *et seq.*,

one of said Land Records, conveying to the said Company the said north one-half of original lot 11 in square 378; to which deed the defendant objected; but the court overruled the objection,
96 and admitted the said deed in evidence; to which ruling the defendant duly noted his exception 19. With this document and as a part of it there is a certificate by the secretary that at a special meeting of the stockholders after due notice at the office of the association August 9th, 1894 a resolution was adopted directing the president to convey in fee-simple the title to the said real estate to the Commercial Alliance Insurance Company for such consideration as he might deem advisable.

The Government then re-offered as a link in the chain of title to real estate and as the foundation of a claim to personal property, the said decree of June 27, 1896, as to clauses 1 and 2 thereof; to which the defendant objected for the same reasons stated in his former objection to said decree. The court again sustained the objection as to the second clause thereof, and admitted the said first clause in evidence, to which latter ruling the defendant duly reserved his Exception 20.

The United States then re-offered the said Auditor's Report of July 31, 1900, and withdrew said offer and then offered schedule "A" of said report; to which the defendant objected; the Court overruled said objection, to which ruling the defendant then and there excepted; and only said schedule "A" of said report was received in evidence. (21) D. T. W.

Schedule A of this Report charges the defendants with a balance of $15,090.74.

The Government then offered a Supplemental Report of the Auditor, filed August 30, 1900; to which the defendant objected for the reasons stated in his last Exception; but the court overruled the objection, and admitted the said report in evidence, to which
97 ruling the defendant duly reserved his Exception 22.

The Supplemental Report merely corrects an error of $50.00 in the credits of the said report of July 31, 1900, and increases the said charge of $15,090.74 to the extent of $50.00.

The Government then offered in evidence the Auditor's Report, filed December 7, 1903; to which the defendant objected for the reasons stated in Exception 21; and because the said Report postdated the time of the offense alleged in the indictment; but the court overruled the objection and admitted the said Report in evidence; to which ruling the defendant duly reserved his Exception 23. (D. T. W.)

The offer was made as follows:

Mr. EASBY-SMITH: I now offer the final report of the Auditor filed December 7, 1903. It is undated.

Mr. BAKER: Do you claim the receivers made a report after this?

Mr. E-S: I do.

Mr. B.: Where is that report: Let me see it.

Mr. E-S: I have not offered it yet.

Mr. B: I should like to look at it. We object to this because it would appear that the report of the receivers to which Mr. Easby-Smith refers was made before this report of the Auditor—Nov. 23, 1903, and on the back of it is Filed Nov. 23, 1903."

Mr. E-S: That is not a court filing.

Mr. B: No, not a court filing; but it was identified.

Mr. E-S: Merely as to the signatures.

Mr. B. And this report of the Auditor was filed Dec. 7, 1903, and after the date laid in the indictment.

98 The COURT (after argument): The date does not cut any figure. The fact that the date is in that paper does not prove it was filed that day or made that day.

Mr. E-S: I offer this both as to the schedule of Lipscomb and Fields and as to the schedule of distribution, promising to follow it up with the decree of the court ratifying and confirming the distribution.

Mr. BAKER: We object to it.

The COURT: This is the same paper, Mr. Baker—the Auditor's report?

Mr. B.: This is the Auditor's report.

The COURT: The objection to that is overruled.

Mr. B: I was going to call your Honor's attention to the fact that in the other reports they were only offering in evidence the schedules showing the account of the receivers on the ground that in this report of the receivers they acknowledged and admitted the report of the auditor. Now they go further in this case and want to offer in evidence the schedule of distribution, which is certainly a finding of fact by the auditor, and which was excluded a few minutes ago, in excluding a certain portion of the decree which your Honor excluded.

The COURT: You expect to show there was something in that order of distribution?

Mr. E-S: Yes; I expect to offer that and this decree. Then I expect to re-offer section 2 of the decree of June, 1896, thinking I had then complied with the requirement as set out by your Honor as to that part of that decree.

99 The COURT: Do you expect to show that this order was never complied with?

Mr. E-S: Yes. You mean this final order, your Honor?

The COURT: The order of distribution.

Mr. E-S: Yes.

Mr. B: Is it offered for the purpose of showing title in these people?

Mr. BEACH: For all purposes.

Mr. BAKER: They are trying to get in exactly what your Honor has ruled out, the part of the decree that attempted to say who owned the personal property. They now want to get in this schedule of distribution, claiming by that they can show title to the personal property.

The COURT: Why is it not evidence tending to show conversion?

Mr. BAKER: It is not evidence tending to show a conversion because it is a report of a finding of fact on the part of the auditor of so much money in their hands. It is a further report of the auditor finding as to who is entitled to this money; it is a report that was filed after the date alleged in the indictment, and certainly can cast no reflection or light on the issue involved, and that is whether or not this defendant did on the day alleged in the indictment, or some day, embezzle money in his hands belonging to somebody. But my particular objection to the paper is the objection which was sustained by your Honor a few minutes ago. The only object of the Government in getting this paper in evidence is for the purpose of trying to show title in somebody, and we contend it cannot be used for that purpose.

100 The COURT: That may be; but if it is relevant for another purpose it must be received. It seems to me it is relevant in connection with an order of distribution and proof that the order was not complied with, exercising probative tendency on the question of conversion. The objection is overruled.

Mr. BAKER: We note an exception.

Mr. Easby-Smith thereupon read in evidence to the jury the paper above referred to, "as to both schedules thereof."

101 The United States then offered in evidence a decree and order of distribution of May 5, 1904, ratifying the said Auditor's Report of December 7, 1903; to which the defendant objected for the reasons stated in his Exception 23; but the court overruled the objection, and admitted the said decree in evidence; to which ruling the defendant duly reserved his Exception 24.

The said decree is as follows:

Filed May 5, 1904; J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 15907, Equity Docket 37.

THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION
vs.
THE COMMERCIAL ALLIANCE LIFE INSURANCE COMPANY.

No. 15809, Equity Docket 37.

ROBERT BALL ET AL.
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

No. 16072, Equity Docket 38.

JAMES S. EDWARDS, Surv. Admr.,
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

No. 16165, Equity Docket 38.

MAN S. QUARLES, Adm'r.,
vs.
THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION ET AL.

The above entitled consolidated causes, numbered respectively 15,907, 15,809, 16,072 and 16,165, in Equity, in this Court, having come on for hearing upon the exceptions of the respondent, William T. Gilbert, Receiver of the Commercial Alliance Life Insur-
102 ance Company, filed January 6, A. D. 1904, in said cause No. 15,907, and upon the bills of complaint, petitions of intervenors, answers, replications, papers, proceedings and evidence in each and all of said causes, and having been considered by the Court, it is, this 5th day of May, A. D. 1904, by the Court adjudged, ordered and decreed that said exceptions be, and the same are hereby overruled, and that the Auditor's Report, Account and Distribution filed December 7, A. D. 1903, in said cause No. 15,907, be and the same are, hereby finally ratified and confirmed, and that Andrew A. Lipscomb and Thomas M. Fields, Receivers, be, and they are, hereby directed forthwith to make distribution in accordance therewith.

ASHLEY M. GOULD, *Justice.*

The Government then called as its witness W. T. TYSER, who having been duly sworn, testified that he is a member of the Metropolitan Police Force, and one of the detectives at headquarters; that he knows the defendant; that he began to look for the defendant early in June, 1904, but could not find him; that he went to New York City three times and had circulars sent broadcast through the United States with a photograph of defendant, offering a reward for his arrest; that he finally found the defendant at Rayville, N. Y., on March 9, 1905, at the house of one Carpenter, and arrested him there, and brought him to Washington; that he heard said Carpenter call the defendant by the name of Dr. Brown, to which name the defendant responded; that the defendant consented to return to Washington, on the paper which the witness then had with him; and that
103 the witness made every possible effort to find the defendant here in June, 1904, by inquiries of the defendant's friends, and at places he had visited.

The Government then re-called SAMUEL MCCOMAS HAWKEN, who was then shown a paper purporting to be a bill in Equity Cause No. 16165, which he identified as from the files of said cause. Another paper was then shown him, purporting to be a stipulation for con-

solidation, which he also identified as from the files of the same cause. Another paper was then shown him, purporting to be a bill in Equity Cause No. 16072, which he identified as from the files of said cause. Another paper was then shown him, purporting to be an order consolidating said Equity Cause No. 16072 with Equity Cause No. 15907, which he also identified as from the files of said former cause. Another paper was then shown him, purporting to be a demurrer of Lipscomb and Fields, which he also identified as from the files of said Equity Cause No. 16,165. Another paper was then shown him, purporting to be an answer of Lipscomb and Fields to the bill in said Equity Cause No. 16072, which he identified as from the files in said cause. The witness then identified the defendant's signature to said answer. The Government then offered in evidence the bill in Eq. No. 16072; the defendant being a party thereto; to which the defendant objected because the same is irrelevant to the issues in this case; and because the defendant is not charged as a receiver in said cause; but the court overruled the objection and admitted the said bill in evidence; to which ruling the defendant duly reserved his

D.T.W.

Exception 25. Counsel for Defendant then withdrew his objection to paragraphs 18 and 19 of said Bill, and consented that so much of said Bill be received in evidence; The Government then

104 offered the order consolidating Eq. No. 16072 with Eq. No. 15907; to which the defendant objected for the reasons stated in Exception 25, but the Court overruled the objection, and admitted the said order in evidence; to which ruling the defendant duly reserved his Exception 26. The said order is as follows:

"On motion of the complainant, by his solicitors, it is this 28th day of December, A. D., 1894, ordered that this cause be, and the same is hereby, consolidated with the suit of the defendant the Washington Beneficial Endowment Association against the defendant The Commercial Alliance Life Insurance Company of New York, Number 15907 equity, now pending in this court.

W. S. COX, *J.*"

The Government then offered in evidence the said answer of the defendants, Lipscomb and Fields, as to paragraphs 18 and 19 of the

D.T.W.

bill No. 16072. Counsel for defendant withdrew his objection to so much of the answer as answered paragraphs 18 and 19 of the Bill and consented that the same be received in evidence; and the Government then again offered the whole bill No. 16072; to which the defendant again repeated his objection in Exception 25. The court then sustained the objection to all of said bill except "the endorsements, with the file marks on the bill, the caption showing the interested parties, the opinion if there is one, and paragraphs 18 and 19;" and overruled the objection as to the said excepted matters and admitted the same in evidence; to which latter ruling the defendant

duly reserved his Exception 27. The said caption and paragraphs 18 and 19 of said bill were then read to the jury as follows:

105 *Original Bill, &c.*

Filed, December 11, 1894.

In the Supreme Court of the District of Columbia.

No. 16072. In Equity.

JAMES S. EDWARDS, Surviving Administrator, with Will Annexed, of Anthony Buehly, Deceased, Complainant,

vs.

THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION, THE Commercial Alliance Life Insurance Company, and Andrew A. Lipscomb, and Thomas M. Fields, Receivers, Defendants.

To the Supreme Court of the District of Columbia, sitting in equity:

The complainant states as follows:

* * * * * * *

XVIII.

By an order of this court passed in said suit of the defendant endowment association against the said Alliance Insurance Company, No. 15,907, in Equity, on the 6th day of November last, the defendants Lipscomb and Fields were appointed receivers to take charge, custody, control, and possession of all of the property— real, personal and mixed—including all books, documents, papers, vouchers, bills and correspondence of any and every description, so as aforesaid assigned, transferred, and conveyed to the said Alliance Insurance Company, and to hold the same subject to the further order of the court. A copy of this order is herewith filed as a part of this bill, marked "Complainant's Exhibit No. 8." Under the authority and provisions of this order said receivers have qualified and have taken possession of the property and things committed to their custody and care as aforesaid, and now hold the same under the pro-

106 visions of said order. Your complainant is informed and believes and therefore further states that the books, records, and papers now in such custody and control, should and will show the amount of money collected by the said endowment association by reason of the assessments made on the surviving members thereof or certificate-holders as aforesaid, and also the condition and character of the property and funds so as aforesaid held by said endowment association when said Nalley died, and what portion thereof, particularly and in detail, through the said attempted sale and transfer was actually paid, turned over, and delivered by it to said Alli-

ance Insurance Company, the unpaid death losses, the dates of the death of the several certificate-holders, the amount payable to the several beneficiaries named in each certificate, and the names of such beneficiaries now claiming to be paid from such property, funds, or moneys, and all of which your complainant is further advised and avers is necessary for him to know to enable him to prosecute this suit and to protect the interests of the estate he represents as aforesaid in the premises, and your complainant claims that he is entitled to a discovery from such of the defendants as may have any knowledge or information thereof as to all of such matters and things.

XIX.

By a further order passed in said equity cause No. 15907 the said receivers were directed to proceed to sell all of the real estate and personal property in their possession, except the books, papers, and documents aforesaid, and the said real estate is now under advertisement for sale under such authority. A copy of this order, as a part of this bill, is also filed herewith, marked "Complainant's Exhibit No. 9."

107 Your complainant is further advised, avers and claims that any sale or disposition of said real estate and premises and property will be subject to the lien and rights of your complainant as aforesaid, not being a party to the proceedings under which said orders were passed and having no connection therewith, and also subject to the final decree in and disposition of this cause.

* * * * * * *

Paragraphs 18 and 19 of the said answer were then read to the jury as follows:

* * * * * * *

18.

In answer to the allegations of the eighteenth paragraph of the said bill, these defendants say that they admit their appointment as receivers as therein set forth, and that they have heretofore taken possession of the property mentioned in the order appointing them. They have no personal knowledge as to the remaining allegations of the said paragraph, and therefore neither admit nor deny the same.

19.

In answer to the allegations of the nineteenth paragraph of the said bill, these defendants say that they have heretofore sold the real estate and personal property in their possession, but still have the books and documents in the said bill mentioned. Answering the allegations of the latter part of the said paragraph, these defendants say that the complainant is bound by the sale of the said real and personal property for that this cause has been consolidated with the cause in which

the orders appointing these defendants as receivers and directing them to sell the said real and personal property were passed, and for that the said sales by them were reported to and ratified by
108 the court in this cause in addition to the cause in which they were appointed.

* * * * * * *

The witness then identified a mandate of the Court of Appeals of the District of Columbia, dated May 20, 1899, affirming the said decree of June 27, 1896, and remanding the cause "for the purpose of the audit directed by that decree, and for such further proceedings as may be proper in the premises." This mandate was not offered in evidence, but during the argument of defendant's counsel to the jury it was agreed, with the approval of the court, between counsel for the respective parties, that the said mandate should be considered in evidence; and the defendant's counsel read to the jury, during his argument, portions of the opinion of Mr. Justice Cox on which said decree of June 27, 1896, was based; which latter opinion was adopted by the Court of Appeals as part of its said opinion; said opinions being reported in full in 10 App. D. C. 316. The said opinion of Mr. Justice Cox is to the effect that the Washington Beneficial Endowment Association was dissolved on August 9, 1894, by its said sale and transfer on that date to the Commercial Alliance Life Insurance Company; and by the facts that the said company bought the property and not the stock of the said Association, and that with the $14000.00 purchase money received for its property the said Association then redeemed and extinguished all of its outstanding stock; that its said deed of that date to the said Company was in equity constructively fraudulent as against creditors of said Association, and for that reason should be set aside as against them; that the said creditors do not proceed on the ground that the deed was void as fraudulent under the statute of 13 Eliz., and there is no averment that
109 there was express fraud under the statute of Elizabeth to cheat and defraud creditors; that "there is no such averment in any one of those bills which are consolidated, but they all proceed on the ground of trust. * * * My conclusion is that the deed from the Beneficial Endowment Association to the Commercial Alliance Life Insurance Company must be set aside, and the proceeds applied to the satisfaction of the debts as far as they can go;" and that the said proceeds of the said real estate belong exclusively to such creditors. The following parts of said opinion were read to the jury in argument of defendant's counsel:

"We know that the old rule of the common law was that the corporation expired upon the death of all its members; and so also if the members ceased to be members, the corporation must cease, too. There cannot be a stock corporation without stockholders. This was a stock association, and the trustees had to be elected from the stockholders and the president elected from the trustees, so that the result of this transaction was that there were no stockholders, trustees or president. If it was sought to enforce these contracts,

who could bring the suit? Certainly, nobody. The corporation had dissolved itself. It had vanished into thin air. The promises of the Commercial Alliance were made to a mere phantom and could not be enforced. * * * I have not found it necessary to pass upon the matters in controversy between the two associations, because, without reference to them, the creditors are entitled to the whole fund as against both Companies."

The said opinion of the Court of Appeals affirms the said Decree of June 27, 1896, and opinion of Mr. Justice Cox; and holds also that

110 the said suit of the said Association against the said Company virtually became a suit by creditors and certificate holders to reach the assets of an insolvent corporation for the satisfaction of their claims; that "as such it would seem to have been treated by all the parties; and as such certainly it was regarded by the Court below at the hearing;" that "the substantial question in this case is—to whom does the fund in court equitably and justly belong;" that if the transaction between the said Association and Company was as claimed by the President of said Association, "a court of equity could not lend itself to a performance so absurd as would be the restoration of property from the grasp of the Commercial Alliance Company, as a company, to the possession of the same Commercial Alliance Company as the sole stockholder, and, therefore, entire owner and proprietor of the Endowment Association and of all its property and franchises;" that "it is clear that the Commercial Alliance Company has no just right to set off that sum of $14000 against the claims of creditors of the Association;" and that if their claims should not exhaust the funds in the hands of the receivers, "in that event, of course, any residue undisposed of would go to the Commercial Alliance Company."

The Government then called as its witness CONWAY ROBINSON, who, having been duly sworn, testified that he is a lawyer and attorney for Morrision named in said Auditor's Report of Dec. 7, 1903, as a distributee; and that as far as his knowledge goes there has been no distribution to his client.

The United States then called JAMES E. PADGETT as its witness, who said he is a lawyer, and represented Henry Anne Stuart, one of said distributees; and that so far as he knows there has been no distribution to her.

111 All of the orders and decrees passed in said Equity Cause No. 15,907, and consolidated causes, were recorded finally and at length in the minutes of the Court the same day they were passed.

In a certain letter in evidence written by the defendant in 1904, he referred to the same moneys mentioned in the indictment as the "W. B. E. A. money."

At this point the U. S. Attorney, Mr. Beach said: "The Government rests, if it please the Court."

Thereupon the defendant moved the court to strike out all the evidence offered by the Government tending to prove by secondary evidence the existence of a charter of the Washington Beneficial Endowment Association, because there is no evidence to show that there ever was an original charter in existence, or that it was ever properly or duly executed; and because no sufficient foundation has been laid to prove the said document by secondary evidence; but the court overruled the motion; to which ruling the defendant duly reserved his Exception 28.

The defendant then called JOHN JOY EDSON as his witness, who, having been duly sworn, testified that he is President of the Washington Loan and Trust Company; that he was connected with the Washington Beneficial Endowment Association as a stockholder and policy-holder at the time it failed, which was in 1894; that said Association was then doing business on Tenth street near the gas office; that it ceased to do business in 1894; that all of the stock of said Association including his was sold by it to the Commercial Alliance; that since 1894 the said Association has not carried on any business in the District of Columbia, or elsewhere that he knew of; that the Tenth street building is No. 419, where the Franklin Fire
112 Insurance Company now is—the same building that was purchased by said Company; that in speaking of the transfer of stock he means his own stock; and that he does not know about anybody else's stock, only from hearsay.

The defendant then called DAVID H. MEAD, as his witness, who, having been duly sworn, testified that he is a patent Attorney residing in Washington; that he knows the defendants Lipscomb and Fields; that on one occasion the witness saw Mr. Fields get some money from the Washington Loan and Trust Company; that this was on September 8, 1903; that the witness did not see Mr. Fields draw the money from the bank, but saw the money after he got it from the bank; that the bank Mr. Fields went to was the Washington Loan and Trust Company; that Mr. Fields went there in the morning about 10 or 11 o'clock; that the witness saw Mr. Fields take a check in when he went into the bank; that the witness waited outside, and walked with him back to his office; that just before Mr. Fields came to his office he took out a thousand dollar bill, and put it into an envelope and called the witness' attention to it, saying, "there is a transaction here that I may want to recall to your mind some time;" that Mr. Lipscomb was in Mr. Fields' office waiting for him; that Mr. Fields showed the witness this envelope before he went in; that Mr. Fields walked in and handed it with the thousand dollar bill to Mr. Lipscomb; that the witness did not hear anything said particularly at that time between them; that he did not pay any attention to that; that the only thing which made an impression on him was Mr. Fields calling his attention to the thousand dollar bill, and saying that he might refresh his memory about it later, or some-

113 thing of that kind; that Mr. Lipscomb after the envelope was handed to him, took it and walked into a back room by himself; that the witness knows that the thousand dollar bill was in that envelope; that he saw it put there, and saw it handed to Mr. Lipscomb; that after the bill was put in there the envelope was not out of the witness' sight up to the time Mr. Lipscomb got it; that after he saw the envelope handed over to Mr. Lipscomb, he, the witness, was there for ten or fifteen minutes; that Mr. Lipscomb went away before the witness did; that the witness waited until after Mr. Lipscomb left; that the witness was in the room with Mr. Fields; that Mr. Lipscomb went out to the back room, or the hallway, or somewhere, by himself, and then he came *came* back through the room where Mr Fields and the witness went, and Mr. Lipscomb went away before the witness did.

On cross-examination the witness said that this was September 8, 1903, during the morning or during the banking hours at least; that the witness first saw Mr. Fields at his, Mr. Fields' office, that the witness had gone to Mr. Fields' office that morning; that the witness saw Mr. Fields have the check before he went into the bank; that Mr. Fields and the witness left Mr. Fields' office together, and Mr. Fields had the check; that the witness first saw the check just before Mr. Fields went into the bank; that Mr. Fields said: "I am going in here to get some money;" that Mr. Fields had asked the witness to walk up to the bank, saying that he was going there to get some money; that was the first time the witness saw the check, but he did not read it; that Mr. Fields had the check, and went into the bank, and then came out again; that the witness saw the money in Mr. Fields' hand shortly after he came out of the bank; that Mr. Fields and the witness then walked back together to

114 Mr. Fields' office; that Mr. Fields took the thousand dollar bill and put it in an envelope and handed it to Mr. Lipscomb, who was there when they returned; that Mr. Lipscomb then went into the back office; that the witness got no part of that check himself, and had no interest in the transaction; that Mr. Fields simply called the witness' attention to the fact that he was giving Mr. Lipscomb a thousand dollar bill, and asked the witness to specially note it; that this is the reason the witness remembered the date.

As to the foregoing testimony of Mr. Mead, the following then occurred:

Mr. BEACH: I move to strike it out. The Court: The motion is granted. Mr. Baker: We note an exception (29). The Court: This motion is granted on the ground that there is no evidence tending to show that the money was of the fund in question. Mr. Baker: We had a check of that date for $1300 already in evidence. Mr. Easby-Smith: Where is that check? Mr. Baker: There it is. I will show the check to your Honor with the signatures cut off. The Court: It is quite clear to me that if you charge a receiver with embezzling one thousand dollars, it means that he wrongfully con-

verts it to his own use. If he shows that he did not wrongfully convert that thousand dollars to his own use, but gave it to his co-receiver, who, under the law, was entitled to have possession of it, that is an absolute defense to that item. Mr. Beach: Your Honor holds that it stays in on the ground that it is simply a transaction of the custody of the thousand dollars from one receiver to the other. The Court: Yes. Mr. Beach: On that ground I have no objection in the world to it going in. The Court: Note, Mr.
115 Stenographer, that in view of the check of September 8, the testimony, of Mr. Mead stands.

The defendant then called HOWARD C. WALL as his witness, who, having been duly sworn, testified that he knows the defendants Lipscomb and Fields; that he recalls being present at a money transaction between Mr. Lipscomb and Mr. Fields about two or three years ago, but does not know the exact date; that he saw a check, but did not notice it particularly; that he came into Mr. Coldenstroth's one night about 9 o'clock, and Mr. Fields asked him to cash a check; that Mr. Fields said that Mr. Lipscomb had a check for $500 that he wanted cashed; that the witness replied that he did not have that much money with him; that this was in front of Mr. Lipscomb; that by and by Mr. Fields took the witness over to the side, and said that there was a check there that Mr. Lipscomb had that he was interested in; that Mr. Fields then gave the witness five one hundred dollar bills to cash the check; that Mr. Lipscomb got this money for the check; that the witness kept the check and afterwards gave it to Mr. Fields.

On cross-examination the witness testified that this was in Mr. Coldenstroth's on Ninth Street right above the Academy and D Street, and about 9 o'clock in the evening; that the witness got five one hundred dollar bills from Mr. Fields to cash the check Mr. Lipscomb had; that the check was for $500; that the witness gave the five one hundred dollar bills to Mr. Lipscomb for the check which Mr. Lipscomb gave him first; and that he afterwards gave Mr. Fields this check which Mr. Lipscomb gave the witness.

The foregoing is the substance of all of the evidence offered by the defendant, who thereupon rested. The Government then announced that it had no further evidence to offer.

116 The defendant then moved the Court to withdraw a juror and discharge the jury from further consideration of the case because the Government had not crossed the defendant's interrogatories in New York and London witnesses, which he had filed on May 6, 1905, and because, in view of this fact. the defendant was unable to proceed further with his case. The following then occurred: The Court: Have you issued a summons or subpœna for the witnesses in New York? Mr. Baker: No. The Court: You are aware of the order the court made a week ago to that effect, are you not? Mr.

Baker: No. I am aware of the fact that your Honor said we could have process if we wanted to have them brought here. I am aware of that fact, but there was no order made of record. I examined the record, and found no such order. The Court: The order was directed to be made, and I suppose it is on the record, that process should issue requiring the attendance of those witnesses in New York whenever process was requested by counsel for the defendant. Counsel have understood for a week the request would be granted. Mr. Baker: I understood the attitude of the Court. Our objection is that our witnesses could not get the written documents that it was necessary for them to get in order for them to appear here under subpœna. The Court: I merely ask to ascertain if counsel understands that process could be had. Mr. Baker: Yes, sir. I understand. The Court: The motion is overruled. To which ruling the defendant reserved his Exception 30.

Thereupon the Government and the defendant handed up their respective prayers for instructions, the defendant's counsel stating to the Court that the determination of what of his prayers would be offered would depend on the court's ruling on others, as the
117 court would see from the drafts of the prayers handed up.

The Court then took a recess. After recess the following occurred: The Court: Mr. Stenographer, you may note that a series of 27 special prayers were submitted to the court, fastened together by counsel for the defendant. The Court has examined them sufficiently to ascertain that some are improper statements of law without taking the entire series into view, and they are refused. Mr. Baker: We note an exception to the refusal of each prayer. We note an exception separately to the refusal of each prayer offered. I wish your Honor to understand that we do not offer the prayers as a series. We offer each one separately, and ask your Honor's ruling on each prayer. The Court: I overrule them. They are put together as a series, and as a series are refused. Mr. Baker: Then I offer prayer No. 1. But I suppose the Government should offer their prayers first. I would like to have an exception to the court's refusal to consider the prayers.

Thereupon the said prayers were handed to the clerk, and filed in open court endorsed by the court as follows: "This series of instructions is refused as a series and ex. Wright." The prayers here "refused as a series," with the exception of four, were subsequently offered and passed on separately by the court, and appear hereafter in this bill of exceptions; by the second and third of which, counts 1 and 2 of the indictment were withdrawn from the consideration of the jury and a verdict of not guilty directed as to them; and by the charge the court also directed a verdict of not guilty on the sixth count. The four said excepted prayers were abandoned by the defendant.

118 The Government then offered the following prayer:

"As bearing upon the question of the defendant's guilt or innocence, the jury may and should consider the evidence in the

case which tends to prove that the defendant was a fugitive from justice, and if it finds from the evidence that he did flee from justice that fact, if found to be a fact, while not conclusive evidence of guilt, may, unless explained by something in the testimony, or other facts of the case, be accepted by the jury as circumstances tending to prove that he regarded himself as guilty." (3.)

To which prayer the defendant objected as an incorrect statement of law, and not justified nor supported by the evidence; and because it is misleading; but the court overruled the objection, and granted the said prayer; to which ruling the defendant duly reserved his Exception 31.

The Government then offered the following prayer:

"The jury are instructed as a matter of law that the Government is not required to prove that the exact sum of money mentioned in the indictment was fraudulently converted or appropriated by the defendant to his own use or that such fraudulent conversion or appropriation occurred at the exact date mentioned in the indictment; it is sufficient if any part of such sum was so fraudulently appropriated or converted at any time within three years next before the filing of the indictment." (5.)

To which prayer the defendant objected as being an incorrect statement of law; because it does not confine the jury to the evidence; because it ignores the effect of the presumption of innocence; because it tells the jury in effect that the moneys mentiond in the indictment were in fact fraudulently converted or appropriated
119 by the defendant, and that the exact sum and time of such conversion or appropriation are not material, but any sum or time within three years next before the filing of the indictment is all that is required; but the court overruled the objection, and granted the said prayer; to which ruling the defendant duly reserved his Exception 32.

Thereupon the following occurred:

The COURT: I should perhaps make it clear right here and now, that it is a question which ought to be settled, whether it is appropriate in this jurisdiction for counsel to submit a series of all the way from 27 instructions up to an indefinite number. Some 27 prayers have been submitted here in a series, and in a manner that indicates that the purpose of the request is not to ascertain the opinion of this court on the law in respect to this trial but to save some possible point for reversal in another court. I started to examine these prayers during the recess, and the time afforded did not suffice for the examination of a fifth of them. For me to examine this series of prayers in detail would require the postponing of this trial over two or three days. As before said, they are offered in a series, and as a series they are refused, because some of them are improper statements of law. Mr. Baker: If your Honor please, I will state that the prayers are not offered in a series. They are not offered for the purpose of having— The Court: You will not state that either. What I say controls that. Mr. Baker: Then I note an exception to

the court's ruling, and I ask to offer these prayers separately. The Court: I will not permit them to be offered separately in the form in which they are. Mr. Baker: Then I note an exception to the ruling of the court. (33.)

120 The defendant then moved the Court to instruct the jury on all of the evidence in the case to return a verdict of not guilty, because the evidence shows that the property came into the defendant's possession before the Code took effect; because the evidence fails to show ownership as alleged in any of the said four counts of the indictment either at the time alleged therein, or at any time within three years next before the filing thereof; but the Court overruled the motion; to which ruling the defendant duly reserved his Exception. 34.

The defendant then asked the court to instruct the jury as follows: "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty." (I)

The Court refused this prayer; to which refusal the defendant duly reserved his Exception 35.

The court then instructed the jury, at the defendant's request, as follows: "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty as to the first count of the indictment." (II)

The Court then granted the defendant's following prayer: "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty as to the second count of the indictment." (III)

The defendant then asked the court to grant the following prayer: "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty as to the third count of the indictment." (IV)

121 The Court refused this prayer; to which refusal the defendant duly reserved his Exception 36.

The defendant then asked the following instruction: "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty as to the sixth count of the indictment." (V)

The Court refused this prayer; to which refusal the defendant duly reserved his Exception 37.

The defendant then offered the following prayer: "The jury are instructed, as matter of law, that in determining the question of whether or not the defendant is guilty as charged in any of the counts in said indictment, they must find that he has had possession of money belonging to some of the persons or bodies corporate mentioned in the several counts of the said indictment, and that that money came into his possession on or after the first day of January, A. D. 1902; that no charge can be made against him for appropriating or converting any money that came into his possession as receiver prior to said date." (VI)

The Court refused this prayer; to which refusal the defendant duly reserved his Exception 38.

The defendant then asked the following instruction:

"The jury are instructed under any one of the four counts of the indictment, the government is bound to prove beyond a reasonable doubt, that the persons or corporations, and each of them, therein alleged to be the owners of the moneys mentioned in the indictment, were in existence and the actual owner or owners of the said moneys at the time of the alleged commission of the offense charged, and that unless such existence or ownership at such time and as laid in each or any count, be proved to the satisfaction of the jury be-
122 yond a reasonable doubt, they must find the defendant not guilty." (VII)

The Court refused this instruction; to which refusal the defendant duly reserved his Exception 39. This prayer was then modified and granted as follows:

"The jury are instructed that under either of the two counts of the indictment, the government is bound to prove beyond a reasonable doubt, that the persons or corporations, or one of them, therein alleged to be the owners of the moneys mentioned in the indictment, were in existence and the actual owner or owners of the said moneys at the time of the alleged commission of the offense charged, and that unless such existence and ownership at such time be proved to the satisfaction of the jury beyond a reasonable doubt, they must find the defendant not guilty." (VII A.)

The court then granted the defendant's following prayer, after it was modified by inserting the words "or some of it," where they occur:

"The jury are instructed as matter of law, that they must return a verdict of not guilty on the third count of the indictment, unless they find beyond a reasonable doubt that the defendant was a receiver and had possession of the property and moneys mentioned in the indictment, and that the same belonged to and were the property of the Washington Beneficial Endowment Association at the time of the alleged commission of the offense; that said company had, at the time of the alleged conversion, a corporate existence, and that the defendant, as such receiver, fraudulently converted or appropriated the property or some of it of the said corporation to his own use." (X.)

123 The court then granted the defendants' following prayer, after it had been modified by inserting the phrases "*of* some of them" and "or some part thereof," where they occur, and by striking out the word "joint" before the words "moneys and properties of said persons," where the same occur:

"The jury are instructed, as matter of law, that they must return a verdict of not guilty on the sixth count of the indictment, unless they find, beyond a reasonable doubt, that the defendant was, at the time of the commission of the alleged offense, a receiver, and had in

his possession money and property of Henry Ann Stuart, Howard L. Morrison, Administrator of Zephrine A. Morrison, Mary N. Cassin Administratrix of William D. Cassin, and the Virginia Trust Company, a body corporate, administrator of Alfred Shields; that Howard L. Morrison was, at the time of the alleged conversion, Administrator of Zephrine A. Morrison; that Mary N. Cassin was administratrix, at said time, of William D. Cassin, and that the Virginia Trust Company was, at said time, a body corporate and administrator of Alfred Shields; that the said moneys and properties mentioned in the indictment, were the moneys and properties of said persons or some of them, and that the said defendant, being so possessed of said properties and moneys of the said persons, did fraudulently convert the said properties and moneys or some part thereof, being the properties and moneys of the parties mentioned aforesaid, to his own use." (XI.)

The Court then granted the defendant's following prayer:

"The jury are instructed, as matter of law, that the first paragraph of the decree of the 27th of June, A. D. 1896, revested no title
124 to the real estate that was sold by the receivers, or to the proceeds thereof, in the Washington Beneficial Endowment Association." (XII.)

The Court then granted the defendant's following prayer, after it had been modified by inserting the phrase "or some of them," where it occurs:

"The jury are instructed that under either count of the indictment the government is bound to prove beyond a reasonable doubt, first, that the defendant was a receiver as alleged therein; second, that the moneys mentioned therein came into his possession by virtue of his office or employment as such receiver; third, that such moneys were the property or estate of the persons, or corporations named therein or some of them; and fourth, that the defendant fraudulently converted or appropriated the same to his own use. The intent to defraud is essential and means a criminal intent to deprive the owner or owners absolutely of the said money, and unless such fraudulent intent be shown beyond a reasonable doubt, the defendant must be acquitted." (XIII)

The Court then granted the defendant's following prayers:

The jury are instructed that in this case an intent to defraud is essential and must be proved beyond a reasonable doubt; a mere failure of the defendant to pay over the moneys mentioned in the indictment, even though unexplained, does not raise any presumption that the defendant has fraudulently converted or appropriated such moneys to his own use; nor does the mere fact that the defendant may have converted or appropriated such moneys to his own use, create a presumption that the same was done fraudulently." (XIV)

125 "The jury are instructed that in this case the government is bound to prove the offense charged, and every element thereof, by evidence which satisfies their minds beyond a reasonable

doubt, of the truth of the charge and of every element thereof; that is to say, the evidence must be of such force as to exclude every reasonable hypothesis of the defendant's innocence, and if it be not entirely inconsistent with any reasonable theory of innocence, they must find the defendant not guilty." (XV)

"The jury are instructed that the laws presumes, and they are bound to assume, that the defendant is innocent of the charge against him, and this presumption of his innocence does not yield to a mere preponderance of evidence tending to show his guilt, but only to evidence which establishes his guilt beyond a reasonable doubt, as already defined." (XVI.)

The defendant then offered the following prayer:

"The jury are instructed that the law presumes the defendant to be innocent of the charge against him, and that this presumption continues all through the case and until and unless he be proved guilty beyond a reasonable doubt. This presumption of innocence is stronger than and overcomes any presumption of the continuance of the life or existence of any person or corporation named in the indictment, and also any presumption of the continuance of the ownership of the moneys mentioned in the indictment, even if they may believe that at some time prior to the alleged offense, some certain person or corporation named in the indictment was in existence and was then the owner of such *of such* moneys." (XVII.)

The Court refused this prayer; to which refusal the defendant duly reserved his Exception 40.

126 The defendant requested the Court to grant the following prayer:

"The jury are instructed that if they should believe from the evidence that any of the moneys mentioned in the indictment came into the defendant's possession after January 1, 1902, then, before they can find the defendant guilty, they must find from the evidence, beyond a reasonable doubt, that any such moneys which came into his possession after January 1, 1902, were not paid out for legitimate expenses, but were fraudulently converted or appropriated by the defendant Fields to his own use." (XVIII)

The Court refused the prayer; to which refusal the defendant duly reserved his Exception 41.

The defendant then asked the following instruction:

"The jury are instructed that upon the evidence in this case, they may find the defendant not guilty on the two counts of the indictment, and they must find him not guilty on at least one of the counts." (XX)

The Court refused this prayer; to which refusal the defendant duly reserved his Exception 42, and when refusing said prayer, the Court of its own motion then gave the jury the following instructions:

"The jury are instructed that upon the evidence in this case they

cannot find the defendant guilty on both of the counts which are submitted to them." (XX A).

The defendant then offered the following prayer:

"The jury are instructed that the mere fact that the defendant was absent from the District of Columbia when arrested, does not raise any presumption of itself, even though unexplained, that such absence was on account of the charge in this case; and further, that even if they fully believe that such absence was on account of such charge, it does not of itself create any presumption what-
127 ever of the defendant's guilt." (XXII)

The court refused this prayer; to which refusal the defendant duly reserved his Exception 43.

The defendant then asked, and the court granted, the following instruction:

"The jury are instructed that they are absolutely prohibited from giving even the very slightest weight or consideration or attention to the fact that the defendant has not testified in this case, as a witness in his own behalf, and no presumption whatever can be indulged against him by reason of such fact." (XXIV)

The defendant then asked the court to instruct the jury as follows:

"The jury are instructed in this case that the law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in consideration of the evidence." (XXV)

The court refused this prayer; to which refusal the defendant duly reserved his Exception 44.

The court then granted the defendant's following prayer:

"The jury are instructed, as matter of law, that, in order to find the defendant guilty, they must find from the evidence beyond a reasonable doubt, that the property and moneys mentioned in the indictment were converted by said defendant, Thomas M. Fields, on or after the 1st day of January, 1902." (XXVI)

The defendant then asked the court to grant the following prayer:

"If the jury believes from the evidence that any part of the sums of money mentioned in the indictment were delivered by the
128 defendant Fields to his co-receiver, Lipscomb, then they are instructed, as matter of law, that as to that money so delivered the defendant Fields is not guilty of embezzlement, and they shall so find." (XXVII)

The court refused this prayer; to which refusal the defendant duly reserved his Exception 45.

The defendant then moved the court to require the Government to elect on which of the two remaining counts it would go to the jury; but the court overruled this motion; to which ruling the defendant duly reserved his Exception 46.

The Assistant U. S. Attorney then argued to the jury and during his argument said "the evidence shows the defendant to be a common thief," to which statement the defendant objected as improper

and not based on the evidence in the case; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 47.

The said attorney further stated to the jury that "the evidence means that Eckloff said to Fields "take that out of my bank. I won't have you deposit trust funds to your private account;" to which statement the defendant objected as improper; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 48. The said attorney then exhibited to the jury the aforesaid certificate of deposit of November 8, 1901, and stated to the jury as follows: "I want you gentlemen to look at this. The first signature on this is a forgery. The name of Mr. Lipscomb was forged;" to which statements and each of them the defendant objected as improper and contrary to the evidence, and because there is no testimony that justifies the assertion that any forgery has been committed; and because the defendant is not on trial
129 for any such offence; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 49. The said attorney then exhibited to the jury the checks signed by the defendant on the aforesaid account No. 35191, which checks had been offered and received in evidence. The defendant objected to any of said checks being shown to the jury because the endorsements thereon had not been proven and for this reason had been ruled out by the court. The said attorney replied that he did not offer them as genuine endorsements of these people; that he will show them to the jury; and that he does not say that the endorsements of the parties are genuine or not; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 50. The said checks were then handed separately to the jury, and they examined both sides thereof. The defendants counsel stated that his objection and the ruling might be considered to apply to each check. The Assistant U. S. Attorney then said to the jury: "Now, about the ownership. Well, I believe I will leave that to Mr. Beach." The defendant then moved the court to require the Government to make a full and fair opening, on the ground that he is entitled to it, and is entitled to have the Government state its contentions as to the ownership in his opening argument to the jury. The court said: "I cannot require him to make a full opening, or to say anything about it, unless he wants to." The said attorney then argued to the jury, from the defendant's letter of 1904, that the moneys belonged to the Washington Beneficial Endowment Association. The said attorney then stated to the jury: "And so they found him there posing as Dr. Brown—Dr. Brown, treating people as a physician, trying to break into another honorable profession, Dr. Brown—God help his patients if he treated them as he did his clients;"
130 to which statements the defendant objected as improper and not based on the evidence; but the court overruled the objection; to which ruling the defendant duly reserved his Exception

51. The said attorney then said to the jury that the defendant "did not even try to prove a good reputation;" to which statement the defendant objected. The court said that he did not have to, and that the remark ought to be withdrawn; and Mr. Easby-Smith thereupon withdrew the remark. The said attorney then said to the jury: "And you have seen, gentlemen, how the case has been fought. Counsel have day after day stood in this court like phonographs, the passive mouth-pieces of the defendant, who has conducted his own defense;" to which statement the defendant objected as improper. The court sustained the objection, and Mr. Easby-Smith at once withdrew the statement in the hearing of court and jury. The said attorney referred in his argument to the jury to the fact that the defendant is a lawyer; to which statement the defendant objected as improper; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 52.

The defendant's counsel then addressed the jury, and stated that in the said Auditor's Report of July 31, 1900, the Auditor had decided that the said Washington Beneficial Endowment Association had parted with all its ownership and interest in the said property and moneys by conveying the same absolutely to the said Commercial Alliance Company on August 9, 1894, and had never thereafter re-acquired the same, and that the said Association had been dissolved and had gone out of existence on said August 9, 1894; and was about to read that part of the said Report to the jury;
131 whereupon the Government objected on the ground that it had offered in evidence only Schedule A of said Report, and not the whole of said Report; which objection the court sustained; to which ruling the defendant duly reserved his Exception 53. In answer to a question put by the defendant's counsel, the U. S. Attorney here said that the Government contends that the said Association was the owner of said moneys up to May 5, 1904, and that thereafter the persons named in the sixth count of the indictment were the owners thereof.

The U. S. Attorney then addressed the jury in conclusion and, among other things, said:

"It is for you to say Gentlemen, whether the dead man's money will go to the widow, whether the ward's money shall go to the guardian, or whether it shall be stolen;" to which statements and each of them, and to which line of argument, the defendant objected as improper and not based on the evidence, and as intended to appeal to the prejudices of the jury; but the court overruled the objection; to which ruling the defendant duly reserved his Exception 54.

The Court then charged the jury as follows:

The COURT. Gentlemen of the Jury, the indictment originally contained eight counts. Up to this moment such proceedings have been had as that the responsibility of determining any of these counts, save two, has been withdrawn from you; the third and the sixth counts alone being now before you.

Respecting counts of an indictment, counts are nearly different charges. When the question of the ownership of property is a question material to the merits of an inquiry, and before the trial
132 the District Attorney is in doubt as to whether the ownership be in one or the other of two, it is not only his privilege but his duty to put in the indictment two counts and submit to the Court and jury for their determination on the evidence the question whether the ownership be in the one or the other. This and no more the District Attorney has undertaken to do by incorporating in this indictment Count No. 3 with Count No. 6; so that in presenting the two here he puts upon the Court the duty of determining in the first place whether or not there is any evidence which so tends to prove the ownership as laid in both counts as that the Court ought to submit both counts to you for your determination which of two the ownership if in either was in.

I have examined these counts with considerable care and am in no wise in doubt, that the sum of money charged in each count is the same money that was charged in the other count. The sixth count, averring ownership in four persons, avers that they became owners at a time which by the proof is shown to have been the 5th day of May, 1904.

There is no evidence in this case which tends to prove that any of the money which is identified in these two counts was embezzled by the defendant after the 5th day of May, 1904, that is to say, the date upon which the evidence shows that these four became owners, if they ever did become owners. Therefore there is no evidence in the case which would justify you in finding a verdict of guilty on the sixth count, or even in considering it, and that count is now withdrawn from your consideration.

So that the case stands before you upon the question of the guilt or innocence of the defendant under the third count of the
133 indictment. That count charges that he embezzled, while a receiver, the property of the Washington Beneficial Endowment Association in the sum of $15,974 as the count avers.

The offense of embezzlement, is defined as follows:

"Any receiver into whose possession money or other property of the property of any other person may come by virtue of his office or employment who shall, fraudulently convert or appropriate the same to his own use shall be punished," etc., as in the statute pointed out.

Therefore the first consideration for your determination is, whether or not the evidence satisfies you beyond a reasonable doubt that the defendant was a receiver, and as such received the property of another person, that person being identified in this count as the Washington Beneficial Association.

According to the formal papers which have been offered in evidence pertaining to the litigation in the equity cause, you may take it as a matter, settled by the proceedings of that court, that the defendant was a receiver as charged in this indictment. It is a

question of fact for you to determine from all the evidence whether or not, after he was receiver, he did receive into his possession as receiver property which was the property of the Association which is mentioned in the indictment.

That brings you to the consideration of the questions which have been argued by counsel, pertaining to a sale of real estate, which is claimed by one or the other to have been made by the receiver.

If you find by the evidence that a portion of the property of the Washington Beneficial Endowment Association came into
134 possession of the defendant and his co-receiver, then it is entirely immaterial into what particular form that property may have been transposed prior to an embezzlement, if there was an embezzlement: that is to say, if they took possession of the property in the form of real estate while it was the property of this Association and it was afterwards converted into money through a sale by them under the Courts order, then that money was as much the property of the original owner as the original real estate was the property of the owner.

Now coming to the consideration of the second point made essential by the statute—the property of another person.

The evidence in the case must satisfy you beyond a reasonable doubt that the "other person" named in this indictment, that is to say, the Beneficial Endowment Association, was the owner of the property concerned in this investigation.

This count charges that that Association was an incorporated Company. The incorporation of a company may be proved in one of two manners. Inasmuch as corporations are only created through the manner provided by the law, which involves the issuance of a certain certificate or charter which determines their existence, if that or a copy of it can be produced, that is sufficient to determine the question of the existence of such a corporate body at that time.

There is evidence before you which tends to show that at a certain time a certificate, according to the requirements of the law, was filed in the Recorder's Office, but that it has been destroyed. If you find from all the evidence which has been submitted upon that point, including testimony concerning the identification of
135 the record which was read, that a paper of which that record is a copy was filed in the Recorder's office at the time indicated by that record, then that would justify you in assuming that the corporation has been duly organized and created. If you are not satisfied beyond a reasonable doubt from the evidence that such a paper was filed, you may inquire whether or not as a matter of fact in the commercial world an organization of this name was representing itself as a corporation and as such was doing business under the management of such officers as are required in corporate enterprises, that is to say, a president, the secretary and the like; and if you find from the evidence beyond a reasonable doubt upon that point, that is that the Association was doing business in this District as a

corporation and representing itself to be a corporation, that is sufficient to justify you in finding for the purposes of this inquiry that it was a corporation.

If you find that it was a corporation, then you must proceed to determine whether or not at a later period, at which it is worded in this indictment and claimed by the District Attorney that the defendant received this property and converted the property after receiving it, you must find whether at that time it was the owner of that property. That will call upon you to pass upon the question which is urged by the counsel for the defendant, whether or not this corporation was in or out of existence, if it ever was created The law in that respect is thus:

If you find that the corporation ever was in existence in either of the ways I have pointed out, and if you further find that while it was in existence it acquired ownership of this real estate which has been identified, and that the ownership of the real estate continued
136 to be in that corporation, then it is utterly immaterial whether that corporation was continuing to do business or continuing to exercise the function of a corporation, so long as it never was formally dissolved by judicial proceedings, concerning which there is no proof.

Proceeding then to the consideration of the next essential characteristic of the offense, as defined by the section, it is thus:

"Who shall fraudulently convert or appropriate the same to his own use."

That expression "fraudulently convert or appropriate to his own use" is used by the law to designate a particular intent which must prevail in the mind of the individual concerned at the time of the conversion to his own use, if there be a conversion to his own use; that is to say, a fraudulent intent. For the purposes of this section, whoever converts to his own use the property of another, and at the moment of conversion intends permanently to deprive the owner of his property in that property, that conversion has been a fraudulent conversion; because the essence of the "fraudulent intent," as applied to conversions, is that the law requires no more than proof that the intent permanently to deprive the owner of his property shall have accompanied the act of conversion; and if that intent existed concomitantly with the act of conversion, it was a fraudulent intent.

With respect to the meaning of the phraseology "convert or appropriate the same to his own use," it is plain enough. It needs no further definition.

Certain evidence has been offered, first, in the way of letters; second, that which the District Attorney claims to show flight, which upon the part of the government, it is contended prove upon
137 the part of the defendant a consciousness of guilt. You are entitled to and you should examine these letters, read them and ascertain as far as you can from those letters, in the light of the other facts which are offered to your minds by the other evidence in the case what the intention of the defendant was at the time he wrote

those letters; whether or not he intended by them to acknowledge a consciousness of guilt of embezzlement as charged in the indictment. If he did, you are entitled to take it into consideration as an evidence of a confession or admission of his guilt.

So with respect to the point of flight. If you find from all the evidence in the case that there was flight, that the defendant departed from this jurisdiction for the purpose of avoiding prosecution for this particular offense, then you are entitled to take that into consideration as tending to prove his guilt; but if you find that although there was flight it was not so connected with this particular offense as that you believe he ran away because of his fear of a prosecution, then it ought not to influence you one way or the other.

In the law whenever a defendant is put on trial he is presumed to be innocent until the contrary is established to the requisite degree of certainty. The logic of it is that when an affirmation is made against an individual it cannot be taken for granted, because denial is just as positive as assertion; but inasmuch as the experience of human nature has developed that in the ordinary course of things men are not always committing crimes, when one is charged by the Government with the commission of crime he is taken in the law to be innocent until the evidence proves him guilty to the satisfaction of the jury, and beyond a reasonable doubt.

138 The degree of certainty to which the proof must go in a criminal case is this, that the jury must be satisfied of every essential to guilt beyond a reasonable doubt. That phrase, however, is not one which the law permits a juryman to use as a blanket behind which to screen himself in order to escape an unpleasant duty, providing that duty is made clear to him by the evidence. In human affairs absolute certainty is not always attainable. In the very nature of things reasonable or moral certainty is all that can be attained to on many subjects. When a full, fair and candid consideration of all the evidence in the case produces in the minds of the jury a conviction of guilt, and fully satisfies them that the defendant is guilty, it is their duty to say so; but if an equally fair, candid consideration of all the evidence does not fully satisfy the jury, but only leads them to believe that there are strong suspicions of guilt, the only safe course is to acquit.

Respecting a point which was touched upon by the District Attorney—although this indictment charges the defendant with having embezzled the sum of $15,974, it is not essential that the proof should go so far as to make out that particular sum, and inasmuch as the evidence has dealt with more than a single transaction, in the way of drawing checks and the like, which the Government claims in itself was an embezzlement, I will point out to you the considerations which ought to guide your deliberations in your dealing with those various items.

If you find from the evidence that after January 1st, 1902, the defendant conceived a plan to embezzle this fund systematically, and he did embezzle it at different times in accordance with that precon-

ceived plan, then you would be justified in finding him guilty
139 concerning all the embezzlements that you find the proof makes out; but if you find that there was not such a plan preconceived by him before a first embezzlement, and conclude from the evidence that each conversion by him, if there was a fraudulent conversion by him, was in itself distinct from every other, if there were other fraudulent conversions, then you would only be justified in that state of affairs in finding him guilty upon one single conversion, concerning which all of you must agree. But in determining, in that aspect of the case, the question of his guilt upon a particular conversion, you will be entitled to take into consideration evidence which you find proves other conversions of the same fund; but only as tending to aid you in coming to a conclusion upon the question of intent —if you find he converted an item in question, whether or not you believe that the conversion of that particular item was done with fraudulent intent.

Much has been said concerning the fact that the defendant is a lawyer. If there is anything in the nature of the offense of embezzlement which is calculated to make the human mind regard it as especially heinous when committed by a lawyer, that very fact is one which ought to put you on your guard in this case, so that you do not convict this man of being a lawyer instead of being an embezzler. The consideration ought to have nothing to do with influencing your minds. If he is innocent, this is the only tribunal to which he can come for vindication. If he is guilty, this is the only tribunal to which the Government can come for the administration of the law. Therefore you should deal with the case and every question in it with minds that are utterly devoid of passion.

If you find that his guilt is made out with the degree of cer-
140 tainty which is required by the law, no consideration of sympathy or favor or fear or any human emotion ought to prevent you from so declaring; but if, on the other hand, you in your minds are honestly of the opinion that his guilt is not made out beyond a reasonable doubt, then no consideration whatever ought to permit you to be weak enough to yield to a verdict of guilty.

You may retire and select your foreman.

Mr. BAKER: If your honor please, ought not the record be made straight by taking a verdict upon the three counts of not guilty before the jury retires?

The COURT: That verdict may be entered. There is one thing I neglected to say. The special charges which were read by both counsel in your presence, counsel for the Government and for the defense, are the law of the case in connection with the general charge.

Mr. BAKER: Your honor takes the verdict on the three counts?

The COURT: Yes.

The jury thereupon retired to consider their verdict.

The jury then returned a verdict of guilty on the said third count

of the indictment and not guilty on the first, second, and sixth counts thereof, in accordance with the instructions of the court.

The foregoing exceptions were taken by the defendant, and were duly noted by the presiding Justice on his minutes, before the jury retired to consider their verdict.

To the end that justice may be done in the premises, and that the questions raised by the foregoing exceptions may be reviewed and determined on appeal, the defendant prays the court to sign this his Bill of Exceptions, as of and for the time the same were
141-146 noted; which is accordingly done, now for then, this tenth day of November, A. D. 1905.

DAN. THEW WRIGHT, [SEAL.]
Justice.

Service of copy of foregoing Bill of Exceptions acknowledged this 28th. day of July, A. D. 1905.

J. S. EASBY-SMITH,
Asst. U. S. Attorney, D. C.

Extension of Time to File Record.

Supreme Court of the District of Columbia.

MONDAY, *November* 13, 1905.

The Court resumes its Session, pursuant to adjournment, Mr. Justice Wright, presiding.

No. 24683. Convicted of Violation of Section 841 Code, D. C.

UNITED STATES
vs.
THOMAS M. FIELDS.

Upon motion of the defendant by his Attorney Frank J. Hogan, Esq., it is by the Court Ordered that the time for filing the transcript of the record in the Court of Appeals of the District of Columbia, on the appeal taken in this case, be and the same hereby is further extended to and including December 10, 1905.

* * * * * * *

147 *Praecipe for Transcript of Record.*

Filed November 13, 1905.

In the Supreme Court of the District of Columbia.

No. 24683. Cr. Doc.

UNITED STATES
vs.
THOMAS M. FIELDS.

It is hereby stipulated and agreed, this 13th. day of November, A. D. 1905, by and between the respective parties to this cause, by their counsel, that the clerk of this Court shall forthwith prepare the transcript of the record on the appeal herein, which transcript shall consist of the following:

(1.) Indictment.
(2.) Demurrer.
(3.) Order of severance, M. 39 p. 425.
(4.) Order on demurrer, M. 39, p. 430.
(5.) Motion and affidavit for commission and letters rogatory.
(6.) Order granting motion for commission and letters rogatory, M. 39, p. 441.
(7.) Motion and affidavit for bill of particulars.
(8.) Motion and affidavit for return of papers.
(9.) Interrogatories to Charles F. Miller.
(10.) Interrogatories to Henry D. Hotchkiss.
(11.) Interrogatories to William T. Gilbert.
(12.) Motion and affidavits (3) for continuance.
(13.) Affidavit of U. S. Attorney as to continuance.
(14.) Order overruling motions for bill of particulars, return of papers, and continuance; plea; jury sworn; M. 39, p. 444.

148 (15.) Memorandum of issuance and return *non est* of *Spas. ad. test.* for defendant's witnesses George H. Tichenor, Daniel McConville.

(16.) Verdict; order fixing bail, etc. M. 39 p. 452.
(17.) Motion in arrest.
(18.) Motion and affidavits (3) for new trial.
(19.) Affidavit of Assistant U. S. Attorney as to new trial.
(20.) Order overruling motions in arrest and for new trial; judgment, appeal; waiver of citation; bonds for bail and costs fixed; bill of exceptions submitted, M. 41, p. 15.
(21.) Memorandum of approving and filing of appeal bond.
(22.) Order prolonging term and time to file transcript, M. 41, p. 42.
(23.) Bill of exceptions settled and filed, M. 41 p. 56.
(24.) Order extending time to file transcript, M. 41, p. 119.

(25.) Bill of exceptions.
(26.) Transcript of docket entries in Cr. No. 24664.
(27.) Transcript of docket entries in this cause.
(28.) This praecipe and stipulation.

FRANK. J. HOGAN,
Attorney for Defendant.
J. S. EASBY-SMITH,
Special Assistant Attorney for United States.

149 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 148, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 24,683 criminal, United States, *vs.* Andrew A. Lipscomb, *et al.*, as the same remains upon the files and of record in said court.

Seal Spreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 8th. day of December, A. D., 1905.

JOHN R. YOUNG, *Clerk.*

150 In the Court of Appeals of the District of Columbia.

January Term, 1906.

General Calendar No. 1633, Special Calendar No. —.

THOMAS M. FIELDS, Appellant,
v.
UNITED STATES, Appellee.

Brief Statement of Supposed Errors.

Comes here now the appellant and, under the provisions of Rule VI, Sec. 5, of this court, files this, a brief statement of the supposed errors for which he prosecutes this appeal, as follows: The court erred—1. In holding Code D. C. Sec. 841 to be retrospective and applicable to this case. 2. In holding said section so construed and applied to be constitutional. 3. In overruling the demurrer to the indictment. 4. In denying time to execute the order for commission and letters rogatory. 5. In denying the motions for (*a*) return of papers, (*b*) bill of particulars, and (*c*) continuance. 6. In refusing

to direct a verdict of not guilty on the third count of the indictment. 7. In (*a*) refusing appellant's prayers and (*b*) in granting appellee's prayers, to which appellant excepted. 8. In overruling the motions (*a*) in arrest and (*b*) for new trial. 9. In other respects stated in appellant's various exceptions,

Designation for Printing.

For the consideration of the questions involved, the appellant thinks that the following parts of the transcript of record are not material to be printed, and that the clerk should omit: P. 1, all after line 8. P. 2 all. P. 3, all except last seven lines. Pp. 5–13 both inclusive. P. 16, all after line 8 except signatures. Pp. 27–35, both inclusive. Pp. 142–146, both inclusive.

FRANK J. HOGAN,
Attorney for Appellant.

Service of copy of foregoing statement of errors, and designation for printing acknowledged this 12th day of December, 1905.

J. S. EASBY-SMITH,
Special Assistant U. S. Attorney D. C.

Endorsed on cover: District of Columbia supreme court. No. 1633. Thomas M. Fields, appellant, *vs.* United States. Court of Appeals, District of Columbia. Filed Dec. 8, 1905. Henry W. Hodges, clerk.

TUESDAY, *March 6th, A. D.* 1906.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

The argument in the above entitled cause was commenced by Mr. F. J. Hogan, attorney for the appellant, and was continued by Mr. J. S. Easby-Smith, attorney for the appellee.

WEDNESDAY, *March 7th, A. D.* 1906.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

The argument in the above entitled cause was continued by Mr. J. S. Easby-Smith, attorney for the appellee, and was concluded by Mr. J. C. Gittings, attorney for the appellant.

No. 1633.

THOMAS M. FIELDS, Appellant,
v.
UNITED STATES.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court:)

An indictment presented April 3, 1905, charged Thomas M. Fields and another with embezzlement, in eight counts. Some of these counts were held defective on demurrer, and a verdict of not guilty was directed on others, leaving the third count on which Fields was found guilty, and from the judgment on which he has appealed.

The third count charges, that on November 23, 1903, in the District of Columbia, the said Fields and another were receivers under an order of the Supreme Court of the District entered November 6, 1894, in the case of the Washington Beneficial Endowment Association against the Commercial Alliance Life Insurance Company; that on said date the said receivers (naming them) had possession of a certain sum of money, to wit the sum of $15974.07, of the said value, etc., "being the property and moneys of the Washington Beneficial Endowment Association, a body corporate," which had come into their possession by virtue of their office and employment as such receivers; and that they so having the same in their

possession on November 23, 1903, in the District aforesaid, "and while they were such receivers as aforesaid did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby and then embezzle the same" etc.

Fields was tried alone and after motions in arrest of judgment and for new trial had been overruled, was sentenced to be imprisoned in the penitentiary and kept at labor for the term of five years.

Fifty-seven errors in the proceedings on the trial have been assigned.

It would consume space unnecessarily to discuss these seriatim, as they may be condensed into certain propositions on which the appellant relies.

1. The first proposition relates to the sufficiency of the indictment on objections raised by demurrer and in arrest of judgment.

The indictment is founded on Section 841 of the District Code which reads as follows: "Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

(1.) We are of the opinion that in respect of form the indictment is sufficient. It charges with precision and certainty, that the defendant was appointed a receiver by order of court, that by virtue of said appointment he came into possession of a certain sum of money, alleged to be the property of the Washington Beneficial Association, and that on a certain date, in the District of Columbia, he unlawfully and fraudulently converted and appropriated the same to his own use, and did then and there embezzle the same. This sets out all the necessary elements of the offence as defined in the Section aforesaid without any uncertainty or ambiguity. Evans *v.* U. S., 153 U. S., 584, 587; Potter *v.* U. S., 155 U. S., 438, 445; Knoll *v.* U. S., 34 W. L. R., 94; Moore *v.* U. S., 160 U. S., 268. In the case last cited an indictment was held defective because it did not allege that the money embezzled came into the hands of the defendant in his capacity as an employee. In other respects the indictment which, like this, followed the language of the statute, was upheld. That defect does not appear in the present indictment as it alleges the appointment as receiver and that the money came into the possession of the defendant in that capacity. The allegation of the order of appointment as receiver was sufficiently alleged to warrant its admission in evidence, and that is all that the rules of pleading require.

(2.) Nor was it necessary to allege the particular manner in which the defendant unlawfully and fraudulently converted the money and appropriated the same to his own use. These words have a well known signification, common as well as legal, and are

of common use in indictments for larceny and embezzlement. Gassenhiemer *v.* U. S., 34 W. L. R., 80, 82; Moore *v.* U. S., 160 U. S., 268, 271; Grin *v.* Shine, 187 U. S., 186, 189.

2. The indictment being sufficiently certain in its terms, the question whether the District Attorney should be required to file a bill of particulars was a matter within the discretion of the trial court; and there is nothing to indicate the slightest abuse of that discretion.

3. The question of vital importance in the case, and which has been argued with great force and earnestness, arises on the construction of Section 841, and is presented on demurrer to the indictment, on instructions prayed, as well as on the motion in arrest.

The fact which may be inferred from the indictment is made certain by the evidence, namely, that the money came into the possession of the receivers prior to the enactment of the Code, although it was embezzled thereafter. The contention is that by the plain language of the Section it is not intended to apply to money or other property thereafter embezzled unless the same had come into the possession of the receiver after the date that it went into effect. The words used are, "into whose possession money * * * *may come* by virtue of his office" etc. It is argued that the words "may come" are synonymous with "shall come," and can have no application to anything in the past, but solely to the future.

Considering the whole section, and other related sections defining particular species of embezzlement, we are not prepared to accept this conclusion as to the plain meaning of the phrase used. Words like may, must, shall, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed. The chapter of which this section forms a part undertakes to define and punish every species of embezzlement. One relates to every person who "being chargeable with the collection, safe-keeping," etc. of money or other property, fraudulently converts to his own use the same so "received, controlled or held by him," etc. (Sec. 833). Another applies specially to agents, attorneys, clerks, or servants who shall convert to their own use anything of value which "shall come" into their possession etc. (Sec. 834). Section 837 covers the case of "any person intrusted with anything of value to be carried for hire, or being an inn-keeper and intrusted by his guest" etc. Sec. 838 governs the case of any warehouseman, factor, and so forth, who sells, disposes of, or applies or converts to his own use any property "intrusted or consigned" etc. The general purpose of these sections, as we have seen, is to define and punish embezzlement in the various ways, and by the various persons who may commit the offence, and though different forms of expression are used their general signification is practically the same. The act of embezzlement is the thing to which each section is specially directed, and while, as to that, it is necessarily prospective in its operation, it does not follow that it was intended, also, that there should be no punishment for the embezzlement of money or property except such as

might thereafter come into the possession of the party charged with a duty in respect thereof. It is inconceivable that Congress intended to make a distinction in respect of property thereafter embezzled, dependent upon the time when the same shall have come into the possession of the embezzler. There is no possible foundation in law or morals for such a distinction, and unless compelled by an unmistakeable expression of such an intention, no court would be justified in adopting a construction that would give it recognition. "Nothing is better settled than that statutes are to receive a sensible construction, such as will effect the legislative intent, and, if possible, so as to avoid or reject an absurd conclusion." Lau Ow Bew *v.* U. S., 144 U. S., 47, 59.

With one exception, none of the multitude of cases cited in appellant's brief covers the particular phase of statutory construction here presented. All are distinguishable, and it is unnecessary to consume space by their separate review. The exception referred to is the decision of an inferior court of another jurisdiction, unofficially reported.

We are of the opinion that the learned trial justice did not err in holding that Section 841 comprehends property that may have passed into the defendant's possession as receiver before the time that it went into effect, when embezzled thereafter.

4. After his demurrer to the indictment had been overruled, the defendant, on May 4, 1905, filed a motion, supported by affidavit, for an order compelling the District Attorney to return to the office of the clerk all of the original papers and records in equity cause No. 15907, which is the one in which defendant was appointed as receiver and which contained all the proceedings relating thereto. It appeared from the sworn reply of the District Attorney to said motion, that the papers referred to filled a large basket, and had been obtained from the Clerk of the Supreme Court of the District, because they were needed in preparing the case for the prosecution, as well as to preserve the same because some of the files had been secretly taken from said office; and that access thereto had never been denied to the defendant or his attorneys, but on the contrary they had been afforded facilities for examining the same. In overruling the motion the court announced that if defendant would specify the particular papers needed by him, the same would be ordered into his possession for copy, or he might examine the whole of them if desired. It nowhere appears that the defendant suffered any detriment by the denial of his motion. We are of the opinion that the action of the court was in the discretion necessarily committed to it in such matters, and in the absence of any indication of abuse is not matter of review.

5. On May 8, 1905, the day set for the trial of the case, the defendant filed a motion for continuance to procure the testimony of three witnesses, two of whom resided in New York City, and one was then somewhere in Europe where he expected to remain for two years. The supporting affidavit alleged that on May 3, 1905, defendant filed an affidavit and motion for an order for a commission and letters rogatory to take the testimony of said witnesses, which

was granted. One of the New York witnesses, William T. Gilbert, had been the receiver of the Commercial Alliance Insurance Company (one of the parties to the equity suit No. 15907) and the other, Hotchkiss, had been his attorney. By these, it was alleged, he expected to prove that neither of the corporations recited as owners of the money intrusted to him as receiver, was the owner of the same, and thereby to overcome the proof of the government as to the ownership alleged.

By Miller, it is alleged, he expected to prove that a certain large part of the money had passed lawfully into the possession of defendant's co-receiver (also indicted with him), for the sole purpose of *bona fide* investment in certain safe securities, and that the same never came into the exclusive possession or control of affiant; and that he did not convert the same or any part thereof to his own use. "This proof to supplement other evidence proposed to be offered as to the lawful disposition of all of the moneys mentioned in the indictment, as far as this defendant is concerned." And further, that said Miller is the only witness to corroborate this defendant as to the said part of the said moneys. It was further alleged, that he expected to prove by all three witnesses that about eleven years ago the Washington Beneficial Endowment Association, named in the third count, sold and by deed conveyed away absolutely all of whatever right, title and interest it ever had in the moneys and property mentioned in the indictment, etc.

It has been expressly declared by the Supreme Court of the United States: "That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question." Isaacs *v.* U. S., 159, 487, 489. We perceive no abuse of that discretion in this case. Passing by the question of the right to take the depositions of witnesses in a criminal case, it does not appear that the personal appearance of the New York witnesses could not have been obtained upon application for the proper process for that purpose. However this may be, their proposed testimony as regards the ownership of the fund by the Washington Beneficial Endowment Association—the owner alleged in the third count—would have been incompetent. That Association had attempted to sell its property, from the sale of which the money in the hands of the receivers had been realized; but that sale had been annulled as fraudulent by decree of the Equity Court which appointed the receivers to take possession of the proceeds. Their testimony could add nothing to the fact that such sale had been made, and they could not have been permitted to contradict the decree by which it had been annulled.

As to the witness Miller, his location was uncertain and there was nothing to show a reasonable probability that his evidence could be procured within any definite period if at all. Moreover, the particular facts that he was expected to testify to were not stated. The general statement that he would testify that a large and specific sum of the moneys had passed lawfully into the hands of defendant's

co-receiver, for the sole purpose of *bona fide* investment, does not show a good defence. The funds were in the possession of the receivers jointly, subject to the control and disposition of the court. They had no authority to pay them out or to invest them in securities of any kind save upon order of the court; and it is not pretended that such an order was made. Nor could one of them draw the money from the bank of deposit without the other's signature. It would be an extreme case that would require a court to continue a case indefinitely for the purpose of procuring evidence, even if shown to be plainly competent and material.

6. The next proposition, founded on errors assigned, relates to the ownership of the money which was alleged in the third count to be in the Washington Beneficial Endowment Association, and to the proof of the corporate existence of the same.

(1.) The records of the equity case were introduced with orders therein rendered, showing that the real estate conveyed by the Endowment Association to the Commercial Alliance Insurance Company had been seized and put in the hands of receivers, who were attorneys representing certain of the parties therein. That the conveyance had been annulled, and the property converted into money which passed into the hands of the receivers. The litigation began in 1894, and its history is to be found in Gilbert *v.* Endowment Association, 10 App. D. C., 316, and 21 Idem 344.

Pending the litigation concerning the rights of various creditors and members of beneficiaries of the Endowment Association in the distribution of its assets, the money remained in the hands of the receivers; and reports signed by defendant and his co-receiver showed that the amount charged in the indictment was in their possession by virtue of their appointment and acceptance of the trust. The money into which the land and other assets had been converted took their place and the receivers became responsible therefor.

The conveyance of the property having been annulled, the legal ownership of the same and its proceeds remained in the Endowment Association until a distribution thereof among its creditors and beneficiaries could be determined and carried into effect. That the fund may have been finally ordered to be distributed, after the alleged date of its appropriation by the receivers to their own use, or that it may hereafter be, upon final settlement of the litigation, can have no effect upon that ownership, which was then in the Endowment Association for all the purposes of this case.

(2.) Under the allegations of the indictment it was necessary to prove that the Washington Beneficial Endowment Association, the alleged owner of the fund, was a body corporate.

This proof was attempted to be made on two ways, first by evidence tending to show actual incorporation in April 1877, through proof thereof from the records of the Register of Deeds for the District of Columbia, and second, by reputation. There were some irregularities in the proof of the articles of incorporation, and as it would require considerable space we refrain from its discussion. Proof could either be made in that way or by other evidence tending to show that the corporation was *de facto* organized and acting as such. U. S. *v.*

Amedy, 11 Wheat. 392, 409. Of this there was ample evidence through several persons who had participated in the original organization of the corporation or had had stock in the same. It was shown to have been actually engaged in business from 1877 to 1894 at which time, being insolvent, it undertook to sell its property, real and personal, to the Commercial Alliance Insurance Company, and ceased to do business. It was sued and described as a corporation in the equity suit in which the defendant was appointed a receiver. No matter that it ceased to do business in 1894, and remained thereafter insolvent; it was and still is a corporation for all the purposes of the equity suit and of this case. It is well settled that a corporation does not cease to exist through the discontinuance of its bsuiness, merely, though ceasing to maintain its active organization, or by becoming hopelessly insolvent. Brown *v.* Cement Co. 1 App. D. C., 232, 236. It may be remarked, also, that the defendant, who held the money by appointment as receiver in the equity suit which recognized the corporation as one *de facto,* at least, and under a decree declaring its ownership of that money for the purposes of the suit, is in no attitude to deny its *de facto* status.

7. Several assignments of error relate to exceptions taken to the introduction of certain papers, reports and orders entered in the equity case. These were identified generally as being parts of the said record, and the orders read were those that had been signed by the presiding justice, and which are thereafter customarily copied in the minutes of the court. The objections were in general that these related to money in possession before the Code, and showed, also, that the property originally ordered into the possession of the receivers was real estate, though they showed, also, that the land had been converted into money and that money delivered to the receivers. Both of these questions have been heretofore disposed of.

It is now urged that the orders as entered in the minutes were the best evidence of the same, and that those found in the papers were not therefor admissible. The answer to this is, that no such objection appears in the bill of exceptions, and comes too late. Had it been made at the time, the prosecution, being put upon notice, might have waived the objection by reading the orders from the minutes. The several receivers' reports showing their account and the possession of the balance charged in the indictment, were not only shown to be papers belonging to the record of the equity suit, but defendant's signature thereto was proved also. The substantial objection to these, also, was that they showed the possession of the money prior to the enactment of Section 841 of the Code.

8. Many points made on the refusal of instructions prayed by the defendant, and on exceptions taken to the charge of the court, have been completely covered in the foregoing portions of this opinion, and such as remain open may be considered under one head.

(1.) The exception taken to the refusal of the court to consider the twenty-seven prayers of the defendant submitted altogether is of no consequence, because each of these was thereafter submitted separately, and either given or refused. The remarks of the court

upon the practice of sending up a series of written instructions joined together, may have been unnecessarily severe, upon counsel, for it is not always practicable to make a bill of exceptions reflect all of the surrounding conditions of a particular event in a long and hotly contested trial, but we find nothing therein calculated to influence the jury against the defendant. It is said, on behalf of the prosecution, that the jury were not in fact present when the foregoing occurred. The bill of exceptions containing no recital of the fact of the presence or absence of the jury, it is to be presumed that they were present.

(2) The majority of these prayers when offered separately were granted. Some were founded on defendant's contention in respect of Section 841, while others related to other counts of the indictment—all of which related to the same act of embezzlement, but charged a different ownership than that of the third count—on which the jury were directed to return verdicts of not guilty.

(3) On a refused prayer to find the defendant not guilty on the third count, the sufficiency of the evidence of the fraudulent conversion of the money is assailed. The bill of exceptions does not recite that it contains all of the evidence offered on behalf of the Government, though at the close of that offered for the defendant it recites: "The foregoing is the substance of all of the evidence offered by the defendant. The Government then announced that it had no further evidence to offer." While a bill of exceptions purporting to contain a recital of evidence, apparently full and in regular order of sequence, may, under the particular circumstances of a case, be sometimes accepted as a complete statement in substance of all of the evidence, this one cannot be so taken, because it is apparent from the charge of the court that certain letters of the defendant were offered as tending to show an acknowledgment of guilt, and the same are not recited or mentioned in the bill of exceptions. Taking the evidence as recited, however, we think it sufficient to support the verdict. It showed that the money was in the possession of the receivers; that it had been deposited in a Trust Company by sanction of the court to await the result of the reference to the Auditor, and appeals that were taken in which the execution of the decrees of the trial court were superseded; that it was removed into other banks without an order to that effect, and deposited in the names of the two receivers as individuals; that it was withdrawn through a series of checks cashed at the counter generally by defendant; that when the final order of the tribunal was made there was nothing paid to the parties declared entitled to the same; that pending inquiry the defendant absconded, and when arrested at some point in New York was passing under the name of Dr. Brown. Moreover, a witness introduced by the defendant, testified that upon one occasion the defendant went into the bank and drew a sum of money, and then enclosed a $1000 bill in an envelope which he subsequently delivered furtively to his co-receiver. This evidence was offered upon the theory that it tended to show a lawful disposition of the money, because his fellow-receiver was jointly entitled to the possession.

We do not so understand the powers, duties and obligations of a receiver. The real custody of the property is in the court of which he is a temporary officer by appointment. He has no personal control of the money, and can only pay it out, or invest it by the sanction of the court. From the facts, as related by the witness aforesaid, there being no single circumstance tending to show that it was a mere irregularity without intent to do wrong, the jury might well have considered the act, to that extent, not only a wrongful, but also a fraudulent conversion of so much of the fund.

(4) Among the refused prayers of the defendant is the following: "The law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in the consideration of the evidence." The defendant offered no evidence of good character. Assuming that he was entitled to demand an instruction that good character is to be presumed, even when no issue is made thereon, the one offered went much farther than that, for it requires in addition that he shall be presumed to be "an upright, honest man of integrity" also, throughout the consideration of the evidence. If such an instruction is required to be given, when demanded, there would be no occasion to introduce evidence of good character in any case. We are of the opinion, however, that the court is not required to give an instruction on anything that has not been put in issue. All that the defendant was entitled to was a charge upon the presumption of innocence, and the necessity of the Government to overcome that presumption by proof of guilt beyond a reasonable doubt. Such an instruction was given at the request of the defendant and repeated in the general charge. State *v.* Anslinger, 171 Mo. 489, 415; State *v.* Gartrell, 171 Mo. 600, 606; William *v.* People, 166 Ill. 132, 136.

The authorities relied on by the defendant do not go so far as to hold that the accused is entitled to such a charge as was asked, under all circumstances. McKnight *v.* U. S., 97 Fed. Rep., 210; Mullen *v.* U. S., 106 Fed. Rep., 892. In the first of those cases the judgment was reversed because the court permitted the District Attorney, over the objection of the defendant, to comment upon his failure to prove a good character; and in the second, the court, in refusing the instruction, made remarks decidedly prejudicial to the defendant, respecting his failure to offer similar proof.

(5.) The court, in the general charge, laid down the law applicable to the offence alleged in the third count, and the evidence that had been submitted.

9. We come now to the consideration of errors assigned upon exceptions taken to certain remarks made in the argument of Counsel representing the Government.

These contain much invective against the defendant. In commenting upon the case made against him, he was denounced as a common thief, and as one who had robbed the widow and orphan (who were among those claiming participation in the final distribution of the fund as preferred creditors of the Endowment Association).

Though, unfortunately, not uncommon in the course of the trial of closely contested cases, invective is always in bad taste. Where, however, it is founded on the evidence in the case on trial and relates to the final conclusion which that evidence tends to establish, its permission by the court does not amount to reversible error. State *v.* Gartrell, 171 Mo. 489, 512. The case cited is well considered, and the very point here made is ably discussed and, we think, properly decided. When the counsel went outside the case to say that "the defendant did not even try to prove a good reputation," the court promptly intervened saying that he did not have to, and that the remark should be withdrawn. Counsel then immediately withdrew the remark. No further action was asked of the court, and this is all that he could well have done under the circumstances. Lorenz *v.* U. S., 24 App. D. C. 337, 391; Yeager *v.* U. S., 16 App. D. C. 356, 362.

10. The last point for consideration arises on the recitals of the judgment imposing the sentence. This sentences the defendant to the penitentiary "there to be imprisoned and kept at labor for the period of five years." No forfeiture of the defendant's right or claim to his commissions, costs, and charges as receivers, was added to the sentence.

(1.) While Section 841 declares a forfeiture of a receiver's commissions and charges in cases of embezzlement of the funds in his possession, it is not a part of the punishment which the court, having jurisdiction of the offence, is authorized to impose, and it was properly omitted in entering the judgment upon the verdict, and fixing the penalty. If effective, the question of the forfeiture is for the determination of the Equity Court having jurisdiction in the matter of the receivership when the accounts thereof come on for final settlement.

(2.) Part of the penalty imposed by Section 841 is imprisonment not exceeding ten years, without the addition of the words "at hard labor," as is the case in some other sections defining and punishing offences. When those words are used it is proper for the sentence to so read. But where not used, the imprisonment, if for more than one year, may be in a state penitentiary regularly designated for the purpose. R. S. Sec. 5546. And when sentenced to be imprisoned in such a penitentiary the convicted person is subject to the same discipline and treatment as is provided for those sentenced by the courts of the state or territory in which it may be situated. R. S. Sec. 5539; *Ex parte* Karstendick, 93 U. S. 391, 399; *In re* Mills 135 U. S. 263, 266.

Whether hard labor constitutes part of the treatment and discipline of the penitentiary in which the appellant has been sentenced to be confined for five years, we need not undertake to inquire, though doubtless such is the fact. The words "at hard labor" included in this sentence were unwarranted as well as unnecessary, but it does not follow that the judgment must, on appeal therefrom, be declared void, or reversed with direction to grant a new trial. Raymond *v.* U. S. 25 App. D. C. 555, 562; S. C. on Second Appeal (Present Term).

Having the power to modify, as well as reverse a judgment appealed from the Supreme Court of the District, we shall, without further consideration of the point, modify the judgment and sentence so as to strike therefrom the words "at labor" as being, at least, mere matter of surplusage.

Having found no reversible error in the proceedings on the trial, the judgment will be modified as above indicated, and as modified will be affirmed.

Modified and Affirmed.

TUESDAY, *May 1st, A. D.* 1906.

No. 1633, April Term, 1906.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, modified by striking out therefrom the words "at labor," and as so modified, be, and the same is hereby, affirmed.

Per MR. CHIEF JUSTICE SHEPARD.

May 1, 1906.

TUESDAY, *June 7th, A. D.* 1906.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

On consideration of the motion for a rehearing in the above entitled cause, It is by the Court this day ordered that said motion be, and the same is hereby, overruled.

WEDNESDAY, *June 13th, A. D.* 1906.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

The petition for the allowance of a writ of error to the Supreme Court of the United States in the above entitled cause, was submitted

to the consideration of the Court by Mr. Henry E. Davis, on behalf of counsel for the appellant, in support of petition.

WEDNESDAY, *June 13th, A. D.* 1906.

No. 1633.

THOMAS M. FIELDS, Appellant,
vs.
UNITED STATES.

On consideration of the petition for the allowance of a writ of error to the Supreme Court of the United States in the above entitled cause, It is by the Court this day ordered that said petition be and the same is hereby, denied.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between Thomas M. Fields, Appellant, and the United States, Appellee, No. 1633, a manifest error hath happened, to the great damage of the said Thomas M. Fields as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 31st day of August, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Court of Appeals, District of Columbia. Filed Sep 4–1906. Henry W. Hodges, Clerk.

Know all men by these presents, That we, Thomas M. Fields, as principal, and The Title Guaranty and Surety Company, (of Scranton, Penna.), as surety, are held and firmly bound unto the United States of America in the full and just sum of Three Hundred Dollars to be paid to the said United States of America, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, exectuors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 31st day of August, in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the said Thomas M. Fields, Appellant, and the said United States, Appellee, No. 1633, a judgment was rendered against the said Thomas M. Fields, and the said Thomas M. Fields having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if the said Thomas M. Fields shall prosecute said writ of error to effect, and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

[Seal of The Title Guaranty & Surety Company.]

THOMAS M. FIELDS, [SEAL.]
THE TITLE GUARANTY & SURETY COMPANY, [SEAL.]
By WILLIS W. PARKER, [SEAL.]
Attorney in Fact.

FRANK J. HOGAN,
As to Both.

Approved Aug. 31st, 1906, by—
EDWARD D. WHITE,
Associate Justice Court *of the Supreme Court of the United States.*

[Endorsed:] No. 1633. Thomas M. Fields, Appellant, *vs.* United States. Bond on Writ of Error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Sept. 4, 1906. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein

Thomas M. Fields is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Associate Justice of the Supreme Court of the United States, this 31st day of August, in the year of our Lord one thousand nine hundred and six.

EDWARD D. WHITE,
Associate Justice of the Supreme Court of the United States.

Service accepted for the United States this 4th day of September A. D. 1906.

D. W. BAKER,
U. S. Attorney, D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Sep. 4, 1906. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 96 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Thomas M. Fields, Appellant, *vs.* United States, No. 1633, April Term, 1906, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals at the City of Washington, this 6th day of September A. D. 1906.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 20,360. District of Columbia, Court of Appeals. Term No. 395. Thomas M. Fields, plaintiff in error, *vs.* The United States. Filed September 7, 1906. File No. 20,360.

FILE COPY.

Office Supreme Court, U. S.
FILED.
JAN 7 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

OCTOBER TERM A. D., 1906.

No. 395.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI.

FRANK J. HOGAN,
JOHN C. GITTINGS,
Attorneys for Petitioner.

HENRY E. DAVIS,
Counsel.

FILED OCTOBER 16, 1906.

(20,360.)

(FILED OCTOBER 16, 1906.)

In the Supreme Court of the United States

OCTOBER TERM A. D., 1906.

No. 395.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States, and to the Honorable the Chief Justice and Associate Justices thereof:

The petition of Thomas M. Fields respectfully shows as follows:

1. That he is a citizen of the United States, and a resident of the District of Columbia; he has been a member of the bar of this court since 1896, of the Court of Appeals of the District of Columbia since its organization in 1893, and of the Supreme Court of the District of Columbia since 1885, and, until the charge in this proceeding, he was in good standing, and was in the active practice of law, and in the enjoyment of a substantial income therefrom; apart from this prosecution (which subjects your petitioner to both imprisonment in the penitentiary for five years and a large pecuniary forfeiture of commissions, costs and charges) he has never been arrested nor charged with crime of any sort, but has had the confidence and esteem of his fellowmen, and has been held by them to be, and was in fact, an upright, honest man of integrity and good character; he has received and properly disbursed hundreds of thousands of dollars in money during his career as a lawyer, and as such he has been intrusted with large property interests; but in this case, under Code D. C., section 841, he and Andrew A. Lipscomb, as chancery receivers, were jointly indicted on April 3, 1905, in the Supreme Court of the District of Columbia; a severance was had (R. 4) and on May 8, 1905, your petitioner alone was simply rail-

roaded to trial and infamous conviction at any cost, for the alleged crime of embezzlement of about $16,000 in money which had come into their possession on June 28, 1895; but this crime has not in fact been committed at all, and of it the said trial court was absolutely without jurisdiction; your petitioner was denied the necessary information as to the nature and cause of the accusation against him, he was denied a fair and impartial trial, the assistance of counsel, and the necessary time to execute or get the benefit of compulsory process for his witnesses; and he was also denied the inspection of vital public papers, as well as any reasonable time and facilities to prepare for trial or to make any affirmative defense whatever on the merits, while the then prosecutor and his then assistant exercised a license, especially as to evidence and argument, all to the intense and intended prejudice of your petitioner, and in defiance of his rights under the Constitution and laws; a few months later the said Lipscomb was tried on the same indictment, in the same court, before the same judge, on the same government proof, and by the same prosecutors, but, having been accorded the rights summarily denied your petitioner, he was promptly acquitted; on May 1, 1906, the judgment (R. 26-27) against your petitioner was affirmed by said Court of Appeals, and a motion of your petitioner for a rehearing was denied by that court on June 7, 1906, after the adjournment of this court; your petitioner simply seeks a reasonable chance to relieve himself of the said charge and forfeiture.

2. That in this case your petitioner has recently been allowed a writ of error by a Justice of this court, to which writ a full return (which has not yet been printed) has been duly made and filed herein; he is advised that the jurisdiction of this court on said writ of error may be questioned, and he therefore files this petition for the writ of certiorari, which this court is authorized to issue to said Court of Appeals under section 234 of said code, if its said judgment be final, to the end that if it shall be so found this court will then order its writ of certiorari to issue to said Court of Appeals, and direct the said return to the said writ of error to stand as the return to such writ of certiorari, in order that the said judgment may be reviewed, and justice done in the premises; and as a part hereof your petitioner hereby refers to the certified copy of the record of all of the proceedings in the courts below, made and filed in this case in return to the said writ of error, and also to his brief herein on the merits, in support of the questions presented hereby, as well as the many others which appear in the said record; and he also hereby refers to the memorandum, hereto annexed *ad finem*, concerning the allowance of the writ of certiorari.

3. That a primary question of controlling importance is whether the said trial court had any jurisdiction whatever of the offense alleged in this case—that is, of the alleged embezzlement by a chan-

cery receiver of money which had come into his possession long before Congress passed the statute upon which this prosecution is based, inasmuch as the statute includes only after-acquired property, and there is no other law or property whatever to support this proceeding; that this proceeding is the first of its kind ever instituted in this District, and is based exclusively upon the highly penal section 841 of the Act of Congress of March 3, 1901, "to go into effect and operation from and after" January 1, 1902—ten months in the future—and designed to establish a code of law for the District of Columbia; the said code consists chiefly of old laws carried forward, but section 841 is new, original, complete and exclusive legislation, and is the first law on the subject covered by it ever passed since the foundation of this District, more than 105 years ago; the money involved in this case is the proceeds of the sale of certain real and personal property, which property had come into the defendants' possession (R. 31) on November 6, 1894, and which money had come into their possession (R. 37) on June 28, 1895—almost seven years before said code took effect, and about six years before it was passed; by demurrer, motion in arrest, and numerous exceptions, your petitioner insisted that the trial court was absolutely without jurisdiction of this case, because said section 841, which is under the title "Offenses against Property," is rigidly restricted by its express descriptive terms and intent to such personal property of another as "may come * * * so coming into" a receiver's possession after it has taken effect, and it does not include the money which in this case had come (R. 37) into the defendants' possession long before—in short, Congress, without reference to any other section, has annexed to section 841 a specific description of the property of which the offense must be committed, and this description strictly limits the jurisdiction of the court to the offense of embezzlement of after-acquired property and excludes pre-acquired property, by its very words; the said action is exclusively prospective in all of its terms, and is in full as follows:

> "Sec. 841. EXECUTORS AND OTHER FIDUCIARIES.—Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

4. That the indictment (R. 1-2) charges in substance that on Nov. 23, 1903, Lipscomb and Fields were receivers under an order of the D. C. Supreme Court, dated Nov. 6, 1894, in Equity Cause No. 15907; that as such receivers they had possession of the sum of $15,974.07 in money of that value, which "being the property and moneys of The Washington Beneficial Endowment Association, a body corporate, had then and there come into such possession of them" as such receivers; and that on said Nov. 23, 1903, at the District of Columbia, they fraudulently converted the same to their own use, and thereby embezzled the same, against the form of the statute.

That the said indictment was originally in eight counts (differing chiefly as to ownership), four of which were eliminated by demurrer (R. 4-5) and three by verdict of not guilty (R. 70-71), leaving only the third count (R. 1-2) to support this judgment; that as aforesaid this indictment relates solely to money which had come into the defendants' possession long before the code, and this fact was made certain [R. 77] by the evidence (R. 37), which fixed the exact date when it came into their possession as June 28, 1895.

5. That both of the lower courts in effect concede [R. 77-78] that a strict construction of this statute, according to its words and grammatical arrangement, excludes pre-acquired property and jurisdiction of this case, but hold (34 W. L. R. 382, 383) that there is no reason [R. 78] why Congress should have made a distinction [27 App. D. C. 433, 440] between pre-acquired and after-acquired property, and therefore the statute is to be construed retrospectively to include the former—that is to say, the particular descriptive words used in section 841 are to be enlarged by the court, under the guise of construction, to include a class of wholly excluded offenses, simply because the court thinks Congress should have included them; this conclusion is purely judicial legislation enacted to meet the exigencies of this case, and it has been reached by forcing the interpolation of words [R. 78, "may have passed"] purposely omitted, by denying the plain effect of the unambiguous language of the statute itself, by ignoring the rule of strict construction of penal statutes, and that against constructive offenses, and that against retrospective construction which operates with particular force when, as here, a retrospective construction is neither required nor permitted but actually renders this law unconstitutional and void by reason of its forfeiture clause, which, if effective when so construed, and as construed in this case, operates conclusively and arbitrarily to forfeit and confiscate all of your petitioner's right or claim to commissions, costs and charges which had been duly and faithfully earned, to the amount of about $10,000 (R. 36) before the code took effect, and had been finally

adjusted and allowed by orders and decrees of the chancery court (R. 37, 48); the said conclusion, considering the clear language of the act, is both absurd and nonsensical, and it resolves any doubt or ambiguity in the statute against the accused; and both this conclusion and the method of reaching it, are in direct conflict with said Court of Appeals' own decision of Nov. 8, 1905, in Ohio National Bank *vs.* Berlin, 26 App. D. C. 218, and in direct violation of the rules of statutory construction which this court laid down in 1899 for the guidance of said Court of Appeals, in reversing its judgment in Hamilton *vs.* Rathbone, 175 U. S. 414, and which are also stated in United States *vs.* American Sugar Company, 202 U. S. 562, United States *vs.* Wiltberger, 5 Wheaton 76, France *vs.* United States, 164 U. S. 676, Bolles *vs.* Outing Co., 175 U. S. 262, United States *vs.* Harris, 177 U. S. 305, Sarlls *vs.* United States, 152 U. S. 570, and many other cases decided by this and other courts, and cited in your petitioner's brief herein on the merits.

6. That as the trial court was absolutely without jursdiction of the offense alleged in this case, for the reason stated, and as this court has jurisdiction as aforesaid to issue the writ of certiorari to the said Court of Appeals, and the plenary power of review over its said judgment, such writ should be granted if the said writ of error shall be found untenable, and your petitioner should not be put to further proceedings in *habeus corpus*, which this court would entertain on proper application, on the authority of Chapman *vs.* United States, 156 U. S. 211, Riggins *vs.* United States, 199 U. S. 547, *Ex parte* Coy, 127 U. S. 731, *In re* Nielson, 131 U. S. 176, *In re* Tyler, 149 U. S. 164, *Ex parte* Siebold, 100 U. S. 371, Mackey *vs.* Miller, 126 Fed. Rep. 161 (C. C. A.), and many other cases, because he would then have exhausted all of the ordinary remedies for review of said judgment.

7. That there is also involved in this case a question of profound importance, far-reaching in its effects, and of very frequent recurrence in all criminal trials in federal courts, concerning which there should be uniformity of decision of such courts, but as to which the decision of the Court of Appeals of the District of Columbia in this proceeding is directly contrary to that of the United States Circuit Court of Appeals for the Sixth Circuit in Mullen *vs.* United States, 106 Fed. Rep. 892, under substantially the same circumstances; and this question can be stated thus: In a criminal trial in a federal court, of a charge involving deep moral turpitude, where no testimony has been offered as to the previous character of the accused, does a presumption of good character exist in his favor, of which, on a request therefor, the jury should be instructed?

That the instant case was a criminal trial of a charge of embezzlement in a federal court, involving also a pecuniary forfeiture, where no testimony was offered as to the previous character of the accused

(for want of any reasonable time and opportunity whatever to offer any testimony or to make any affirmative defense at all on the merits), and your petitioner asked the court to instruct the jury (R. 63, Pr. xxv, Ex. 44) "that the law presumes the defendant to be an upright, honest man of integrity and good character;" but the court not only refused to give this prayer, but also denied any instruction or charge whatever on the subject (R. 65-70, Charge).

That in the Mullen case (106 Fed Rep. 892. Indictment for election frauds. Before JJ. Day, Severens and Lurton. Opinion by Mr. Justice Day) this question was carefully considered and emphatically answered in the affirmative, while in this case (reported in [27 App. D. C 433, Record 75] 34 Washington Law Reporter 382) it was hastily and illogically answered in the negative. The sharpness of the conflict between these appellate federal courts, on the same question and under substantially the same circumstances, is made more apparent by the following:

MULLEN CASE.

Syllabus (p. 892): "In a criminal trial in a federal court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed."

Opinion (p. 894): "Does such a presumption exist? We fail to find any difference of opinion in the well recognized text writers upon this subject. All assert that a presumption exists in favor of the accused in the absence of testimony that he had a good character previous to the time of the alleged commission of the offense. It is true the government may not attack the character of the accused until he puts it in issue by affirmative testimony on his part. He is not obliged to do this, but may, if he

FIELDS CASE.

Syllabus (p. 382): "An instruction that 'the law presumes the defendant to be an upright, honest man of integrity and good character,' is properly refused where no evidence of good character was offered by defendant."

Opinion (p. 386): "The defendant offered no evidence of good character. * * * The court is not required to give an instruction on anything that has not been put in issue. All that the defendant was entitled to was a charge upon the presumption of innocence, and the necessity of the government to overcome that presumption."

(Decided May 1, 1906).

(Record p. 83 27 App. D. C. p. 448).

sees fit, rest upon this presumption raised by the law.

* * * * * * * * * * *

"It is true that there are cases which hold that, where there is no testimony on the subject of character, the court is not obliged to say anything to the jury, either one way or the other. But if the presumption exists in favor of the accused, it can not be available to him unless he can have an instruction advising the jury of this proposition of law. This presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence. It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct."

(Decided Feb. 12, 1901.)

That the said opinion is also in conflict with the emphatic and correct admission of the government counsel in this case in the Court of Appeals (Brief for U. S., p. 35) that—

"Unquestionably it is the law that in the absence of any testimony concerning the character of a defendant, the law presumes him to be a man of good character."

That this question has never been directly decided by this court, but the great weight and importance of proof of the good character of the accused, under a charge of *crimen falsi* or species thereof, has been expounded in Edgington *vs.* United States, 164 U. S. 361 (indictment for making false deposition in aid of claim for pension); the general importance of this question, its frequent recurrence, its particular importance in the instant case, and the conflict of decision of appellate federal courts concerning it, warrant this court in issuing the writ of certiorari for the purpose of determining this and other questions presented by this petition and the record in this case, to the end that uniformity of decision in the federal courts may be established concerning the same; there is nothing of higher

importance in law or life than the good character of a man; the court was bound to give a proper instruction on this subject; the Court of Appeals D. C. either did not read at all, or else it utterly misconceived—as it has (R. 83) certainly mis-stated—the Mullen decision; the opinion of the Court of Appeals D. C. also conflicts on this point with the decision of its predecessor, the Supreme Court of the District of Columbia in General Term, in United States *vs.* Neverson, 1 Mackey 153, 158 (indictment for murder), and also with its own previous decision of Jan. 5, 1906, in Posey *vs.* United States, 26 App. D. C. 302, 307 (indictment for arson), as well as with the decisions of other courts; and this question is of unusually vital importance in this case, in view of the base nature of the charge and the utterly unwarranted attacks on your petitioner's character, made both by the trial judge (R. 57, 58-59, comments as to defendant's prayers) and by the then prosecutor and his then assistant in their violent and intensely improper arguments to the jury (R. 63-65), which said judge affirmatively approved.

8. That another question of general importance, and of particular importance in this case, is the duty of a federal trial judge to refrain from comments which weaken or destroy the proper prayers of the defendant in a criminal case, as laid down in Burton *vs.* United States, 196 U. S. 283, 307; that in the present case, at the close of all of the evidence, "the government and the defendant handed up their respective prayers for instructions, the defendant's counsel stating to the court that the determination of what of his prayers would be offered would depend on the court's ruling on others, as the court would see from the drafts of the prayers handed up. The court then took a recess" of forty-five minutes (R. 57).

That the defendant's counsel handed up twenty-seven separate prayers, each on a separate sheet of paper, lightly held together with a mere temporary slip fastener; that the record (R. 57) proceeds:

"After recess the following occurred: The Court: Mr. Stenographer, you may note that a series of 27 special prayers were submitted to the court, fastened together by counsel for the defendant. The court has exmined them sufficiently to ascertain that some are improper statements of law without taking the entire series into view, and they are refused. Mr. Baker: We note an exception to the refusal of each prayer. We note an exception separately to the refusal of each prayer offered. I wish your Honor to understand that we do not offer the prayers as a series. We offer each one separately, and ask your Honor's ruling on each prayer: The Court: I overrule them. They are put together as a series, and as a series are refused. Mr. Baker: Then I offer prayer No. 1. But I suppose the government should offer their prayers first. I would like to have an exception to the court's refusal to consider the prayers.

"Thereupon the said prayers were handed to the clerk, and filed in open court endorsed by the court as follows: 'This series of instructions is refused as a series and ex. Wright.'"

That all of the foregoing took place in the presence of the jury; that the court then ruled on the government's prayers (R. 57-58), and, without any foundation whatever in fact to support or warrant the foregoing and following comments at once proceed in the jury's presence as follows (R. 58-59):

"The Court: I should perhaps make it clear right here and now, that it is a question which ought to be settled whether it is appropriate in this jurisdiction for counsel to submit a series of all the way from twenty-seven instructions up to an indefinite number. Some twenty-seven prayers have been submitted here in a series, and in a manner that indicates that the purpose of the request is not to ascertain the opinion of this court on the law in respect to this trial but to save some possible point for reversal in another court. I started to examine these prayers during the recess, and the time afforded did not suffice for the examination of a fifth of them. For me to examine this series of prayers in detail would require the postponing of this trial over two or three days. As before said, they are offered in a series, and as a series they are refused, because some of them are improper statements of law. Mr. Baker: If your Honor please, I will state that the prayers are not offered in a series. They are not offered for the purpose of having—. The Court: You will not state that, either. What I say controls that. Mr. Baker: Then I note an exception to the court's ruling, and I ask to offer these prayers separately. The Court: I will not permit them to be offered separately in the form in which they are. Mr. Baker: Then I note an exception to the ruling of the court."

Because (*a*) the prayers had not then been offered at all, as the statement of counsel (R. 57) when handing them up expressly shows; (*b*) they were not offered as a series; (*c*) they were not offered "to save some possible point for reversal in another court;" (*d*) it requires but six minutes to examine the prayers "handed up;" (*e*) none of them contained "improper statements of law;" (*f*) we had a right to state, in the presence of the jury, the purpose for which the prayers were offered, and to relieve ourselves of the court's erroneous charge against us; (*g*) we had a right to offer our prayers separately; (*h*) the prayers were handed up with a mere temporary slip fastener holding them lightly together; (*i*) the said statement was in effect that the defendant would be convicted, as there could be no reversal without conviction; (*j*) it was an expression of opinion that defendant was guilty; (*k*) it assumed his guilt; (*l*) it was in effect that he considered himself guilty and was merely trying "to save some possible point for reversal in another court" of certain conviction; (*m*) it was unwarranted, unfair, unlawful, and

intensely prejudicial to the defendant; (*n*) it was necessarily controlling on the verdict of the jury, for it was never withdrawn nor modified in any way, but was accepted by them with the utmost deference (R. 58-59, Ex. 33).

9. That another question of general importance is the limit of the prosecution's proof of the alleged fraudulent conversion in proceedings against fiduciaries for embezzlement, under indictments giving no particulars of the alleged conversion and fraud, and in the absence of any statute dispensing with such particulars; the special question in this case being whether the trial court erred in receiving evidence of ninety-two (92) unconnected, separate, and distinct items, acts, or transactions, each claimed to be in itself a substantive act of embezzlement and received in evidence as such, under the indictment alleging but a single act on one certain date, (*a*) "because the indictment alleges but one offence, and the government should not be permitted to prove any number of alleged acts of embezzlement under an indictment which alleges the embezzlement of a lump sum on a particular day;" (*b*) because 43 of said acts or items preceded the code and the statute of limitations; (*c*) 77 of them involved private checks and certificates of deposit which were materially variant from money alone alleged in the indictment; (*d*) no plan or system was averred or claimed or proved; (*e*) no intent is alleged; (*f*) no election was made by the prosecution; (*g*) none of said acts was shown to be an offense; (*h*) 20 of said items postdated the indictment date of offense; (*i*) five of said acts occurred beyond the District of Columbia; and (*j*) the law elected the act, item, or transaction first proved as that alone on which the Government could rely (R. 38-41, Ex. 14, R. 69-70, charge that jury may convict of all).

That in connection with this question there are also involved the further questions as to the essentials of the proof of conversion and fraud required under said section 841, and what acts it makes criminal; the evidence of the alleged fraudulent conversion in this case is in substance (R. 37-41) merely that the defendants (1) received the money, (2) deposited it in banks, and (3) drew it out of banks, without more; except that in one instance, concerning a certain check (R. 40), it was shown without any contradiction (R. 54-55) that your petitioner cashed it at bank, and at once delivered $1,000 thereof in money to his co-receiver Lipscomb in the presence of the witness Mead, but there was no proof whatever of any improper purpose, or of any purpose, for which your petitioner so delivered the said money; and as to this very item, the ruling of the trial court (R. 53-54) on the government's objection and in the jury's presence, and the opinion [R. 83] of the Court of Appeals (34 W. L. R. 382, 386) in its attempt [27 App. D. C. 448] to do the impossible, viz:

to point out the particular act, item, charge or offense (if any) of which the jury convicted, are as follows:

TRIAL COURT.	COURT OF APPEALS.
"It is quite clear to me that if you charge a receiver with embezzling one thousand dollars, it means that he wrongfully converts it to his own use. If he shows that he did not wrongfully convert that thousand dollars to his own use, but gave it to his co-receiver, who, under the law, was entitled to have possession of it, that is an absolute defense to that item."	"There being no single circumstance tending to show that it was a mere irregularity without intent to do wrong, the jury might well have considered the act, to that extent, not only a wrongful, but also a fraudulent conversion of so much of the fund."

That in this case the said Court of Appeals [R. 79, 80, 82, 83] has enounced and applied (34 W. L. R. 382, 384, 386) the novel, false, radical, dangerous and impossible doctrines that—

Page 386: [R. 82, 83] (*a*) On the trial of one of two joint receivers, on the charge that he has fraudulently converted the trust fund to his own use, and thereby embezzled the same, it is sufficient evidence of embezzlement to convict him simply to show that they drew a joint check (R. 40) for a small part of the fund and he cashed it at bank (R. 54) and delivered the money to his co-receiver (R. 55).

Page 386: [R. 83] (*b*) Such evidence casts the burden on the accused "to show that it [such delivery] was a mere irregularity without intent to do wrong," and, if he does not so show, the jury may well consider "the act, to that extent, not only a wrongful, but also a fraudulent conversion of so much of the fund," tho the trial court tells the jury the very contrary, and the statute requires a fraudulent conversion to his own use.

Page 384: [R. 79, 80] (*c*) If one of two joint receivers permits the trust fund or any part thereof to go into the manual possession of his co-receiver for the sole purpose of bona fide investment in certain safe securities, and the said fund never came into the exclusive possession or control of the former, nevertheless he is *ipso facto* guilty of embezzlement thereof.

Page 384: [R. 80] (*d*) One of two joint receivers cannot, even with the authority of his co-receiver (R. 30), act for both in any emergency or under any circumstances, in receiving (R. 40) or disbursing the trust fund or any part thereof, and if he does so act he is *ipso facto* guilty of embezzlement thereof.

10. That another question of importance is whether section 860 of the Revised Statutes of the United States applies to the Supreme Court of the District of Columbia, and to certain papers put in evidence in this case; with the equity cause 15907, mentioned in the indictment, three others (to each of which your petitioner was a party defendant) were (R. 48) consolidated; your petitioner was required to appear before the said court and the auditor thereof, as a witness, a party, and a receiver in said four causes, and as such, at three different times before said code, was compelled to prepare and produce three certain reports; in this proceeding, and over his objections and exceptions, these reports were given in evidence and used against him as admissions (R. 34); as to them the said Court of Appeals [Record 81] says (34 W. L. R. 382, 385): "The several receivers' reports showing their account and the possession of the balance charged in the indictment, were not only shown to be papers belonging to the record of the equity suit, but defendant's signature thereto was proved;" the said trial court is a court of the United States, and this proceeding involves both a charge of crime and a pecuniary forfeiture; the said section 860 R. S. is in full as follows:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

11. That another question of grave general importance, and of particular importance in this case, involves the extent (if any) to which a federal trial court can lawfully and beyond review deny the accused in a criminal case the rights guaranteed him by the sixth amendment to the federal Constitution and by the laws; the said Court of Appeals has decided this case on the theory that it was "the trial of a closely contested" case [R. 84] and "a long and hotly contested trial" [R. 82], but while in form it lasted one week, yet in fact it was actually in progress only eighteen hours, and was practically an *ex parte* trial of the government's case, with no reasonable time or opportunity whatever to the accused to prepare for trial, nor any reasonable chance whatever to make his affirmative defense on the merits, tho as matters of fact (which your petitioner was prevented from proving) the alleged offense has not been committed at all, many, many orders to pay out or invest were passed in said equity cause at various times and promptly obeyed; two such payments were ordered (21 App. D. C. 344, 369) by said Court of Appeals itself (R. 39) and obeyed; all checks drawn and payments made under such orders were offered and received [R. 38-41] in evidence in this case as proof

of the embezzlement by your petitioner of the moneys represented by each; the receivers' accounts have long since been finally settled, and closed as to all matters except the said forfeiture; that the said money never was converted to his own use nor embezzled by your petitioner; yet this judgment stands against him simply because the trial court usurped jurisdiction of the alleged offense, and summarily denied him any chance at all to make his defense on the merits, and because his other rights were grossly violated, as shown by the record in this case, all of which the said Court of Appeals has approved in accordance with its policy not to disturb judgments against the accused in criminal cases.

12. That the said indictment (R. 1-2) was filed on April 3, 1905; your petitioner was arraigned and pleaded not guilty on April 17; on April 20 (R. 2-4) he withdrew his plea and demurred; his demurrer was heard and determined (R. 4-5) on April 28, and was sustained as to four counts and overruled as to the other four; he at once gave notice (R. 11) in open court that he would apply to the Court of Appeals (which was not then in session) for a special appeal from that part of the order overruling his demurrer, on the reconvening of that court on Tuesday, May 2, which he did, but his application was denied (R. 11) later in the same day; on Wednesday, May 3, he filed his motion and affidavit (R. 5-6) for an order for a commission and letters rogatory to take the testimony of three material non-resident witnesses, two of whom were in New York city, and the other in London, England, and on Thursday, May 4, his motion was (R. 7) granted; section 922 of said code gave him the absolute right to such commission in this case, and section 1058 thereof gave him the like right to such letters rogatory; the government had ten days to file its cross-interrogatories; on Saturday, May 6, before 12 o'clock noon (R. 11), your petitioner's interrogatories under the said order for commission and letters rogatory were duly filed in the clerk's office and copies were served on the then prosecutor; the said trial court was not in session on May 5 and 6; no cross-interrogatories were ever filed; the commission and letters rogatory were never issued; but, over your petitioner's earnest protest and exception, he was forced to trial (R. 29) on Monday morning, May 8, 1905, and was thus entirely deprived of the testimony so sought; he was even unable (R. 18) to get service of process on two important local witnesses, and was also deprived of their testimony.

13. That on Thursday, May 4, 1905, your petitioner filed his motion and affidavit (R. 7-8) for a bill of particulars under the said indictment, which is exceedingly (if not fatally) loose and general in its allegations, and gives no information or specifications as to the nature and cause of the accusation sufficient to enable the accused to know what he must be prepared to meet on his trial, and he

noted this motion for hearing on Monday morning, May 8, at 10 o'clock, and duly served copies on the then prosecutor.

14. That about two months before the alleged trial of this case the then prosecutor removed from the clerk's office of the trial court to his own office, and there kept in his own close custody, all of the original papers and records in equity cause 15907, mentioned in the indictment, and so retained them until, during and after this trial; during the trial he brought them into court in a box, and took them back to his office at adjournment; your petitioner and his counsel were denied inspection [R. 14-15, 16, 28-29, Ex. 1, 23-24] of them in the place where the law required them to be, tho they were public records and of vital importance; on Thursday, May 4, 1905, your petitioner filed his motion and affidavit (R. 9) for an order requiring the then prosecutor to return these papers to the clerk's office for inspection, where they belonged, and noted (R. 10) this motion for hearing on Monday morning, May 8, at 10 o'clock, and duly served copies on the then prosecutor; a rule (111) of the trial court, adopted some years before this proceeding, imperatively forbids such removal of such papers, and section 556 of said code declares them to be public records and that they "shall be open to the public for inspection free of charge," and section 844 thereof punishes such removal by fine or imprisonment, or both.

15. That on Monday, May 8, 1905, your petitioner filed his motion, and the affidavits (R. 10-16) of himself and his counsel, for a continuance "for a reasonable time," your petitioner's affidavit reciting the foregoing facts, and also the many consultations day and night between the petitioner and his counsel; the materiality and details of the testimony of his non-resident witnesses; the immediate retaining of his counsel; that he has a good and valid defense, the nature of part of which will require examination of an elaborate account and a mass of papers, many of which have become intermingled, through no fault of his, with a large number of others, which it will take some time and labor to find; that various proceedings at law and in equity and in other courts are involved, some of which are intricate, but essential to be understood by his counsel; that the prosecutor has had all of the material papers and records in Eq. 15907 in his exclusive possession in his office ever since the indictment was returned, if not longer; that the accused and his counsel cannot properly prepare for trial without opportunity freely to inspect said papers and records where they belong, which opportunity they had not had; that another obstacle was the prosecutor's order to the Trust Company not to show the accused or his counsel or give them any information about certain material checks, certificates and accounts, and the prosecutor's request for delay on their application to him for permission to see the same; that the preliminary proceedings have occurred with such unusual haste and rapid-

ity as to take up all their time, and "reasonable time and opportunity are now required to prepare the case for trial on the facts; that affiant's counsel do not yet know of the material facts or the details of such facts in this case, as neither affiant nor they have had any reasonable time to collect them or the parol and documentary evidence to support them;" that the accused has been compelled to attend to calls for papers and information required by local courts in other cases; that he has given an average of fifteen hours per day to this case, and sometimes twenty-four, and twice had to be out of the city about it; that if his New York witnesses were summoned here it would require some short time for them to produce the documentary evidence required; and in conclusion "that this application for continuance is made in good faith, and not for the purpose of delay; and that this defendant desires a trial as soon as he reasonably can prepare for it;" that this affidavit for continuance is fully supported by those of his counsel, Messrs. Baker and Walker, saying also "that they are not prepared for trial of this case on May 8, 1905, although they have devoted all the time and attention to it that they reasonably could; that they have exercised unusual diligence in this cause, and a reasonable continuance is absolutely necessary in order to prepare properly for trial; and that without such continuance they can be of no substantial service to the said defendant on a trial on May 8, 1905."

16. That on said Monday morning, May 8, 1905, your petitioner's said motions were denied with harsh brevity (R. 28-29), and he was at once forced to trial in an utterly unprepared and helpless state, both of himself and his counsel, as shown by the record of the alleged trial; and in argument, among many other intentionally improper remarks (R. 63-65), the then assistant prosecutor mockingly said to the jury (R. 65) that your petitioner's "counsel have day after day stood in this court like phonographs, the passive mouthpieces of the defendant, who has conducted his own defense."

That the necessary effect of the foregoing rulings was to deprive your petitioner absolutely of every right guaranteed him by the said sixth amendment, but the said Court of Appeals holds that there was no error whatever in the premises, and that they were all matters of discretion with the trial court [R. 77-80].

17. That bank ledger entries of sixty-one checks and thirty-seven of the original checks were offered by the prosecution and received in evidence (R. 38-41) in this case, each as proof of a distinct, substantive act of embezzlement by your petitioner, when in truth and fact many of them were drawn and delivered under specific orders of the chancery court in said Equity 15907, and others under general orders thereof, all of which orders the then prosecutor had in his possession during the trial, among said removed papers and records; many of these orders directed single payments, and some, many;

yet each and all of these ledger entries and checks were sent to the jury as evidence of separate and distinct embezzlements by your petitioner of the various sums represented by each and all of them, and your petitioner was denied the opportunity to produce and prove such orders, and to explain the purpose of and authority for each check, which he could have done fully, if he had been accorded the necessary time and facilities; and sixteen (R. 38) certificates of deposit were given in evidence, and fifteen withdrawals (R. 38-39) were shown in evidence, each as proof of a distinct, substantive act of embezzlement; no election was ever made by the prosecution among these ninety-two items, acts or transactions, but such election was not only refused by the trial judge when asked by your petitioner to compel it (R. 41), but he also charged the jury (R. 69-70) that they could convict of all 92, although, as aforesaid, 43 of them preceded the said code and the statute of limitations (three years) and 77 of them consisted of private checks (R. 38-39) and certificates of deposit (R. 38) which were materially variant from money (*sic*) alone alleged (but not further described) in the indictment (R. 1-2); that as a matter of fact, said receivers, as such, had three separate accounts in two banks other than the accounts and banks mentioned in the evidence in this case; and that solely by the error of the bank, and wholly without the fault or design of said receivers, certain of said certificates and accounts inadvertently omitted the word "receivers" (R. 38-39), as all deposit slips were made up by clerks of said bank (R. 39), and not by the receivers. ["Said ledger entries show the dates and amounts of deposits and payments, but not the dates of checks or the payees or endorsers." R. 39].

18. That while the said indictment (R. 1-2) in form charges your petitioner with the offense of embezzlement of a certain single sum of money on a certain day, no evidence whatever was offered to prove this charge as laid, as the record expressly recites (R. 40); in argument to the jury, based upon no evidence whatever, the then prosecutor and his then assistant expressly charged (R. 63-65) your petitioner with (1) being a common thief, (2) depositing these trust funds to his private bank account, (3) forgery, (4) treating people as a physician, (5) "trying to break into" the medical profession, (6) mistreating his clients as a lawyer, (7) posing under an assumed name, (8) being a fugitive from justice, (9) not even trying "to prove a good reputation," (10) conducting his own defense, (11) being a lawyers, and (12) stealing dead men's money from widows and wards; it is absolutely impossible to tell from this record (and your petitioner does not know, and never has known, and perhaps never will know) of what he has been convicted, and if of any one or more of said ninety-two alleged acts of embezzlement, of what one or ones; or whether all of the jurors agreed on the same thing; or what of the trial court's contradictory rulings were followed by the jury;

that in its opinion in this case [R. 75-85] the Court of Appeals assumes (34 W. L. R. 382) as facts certain material matters not in existence nor in this record, and certain others in direct conflict with the record, and ignores and misconceives and misrecites facts shown by this record, especially in those parts of its opinion relating to inspection of the equity papers [R. 78], continuance [R. 78-80], ownership [R. 80], corporate existence [R. 80-81], conversion [R. 82-83], and arguments of the [R. 83-84] prosecutors [R. 63-65]; and it has decided this case without regard to the theories of the prosecutors and the trial court, and the rulings of the trial court on the proof and prayers and in its charge to the jury, but in some respects in direct conflict therewith, especially [R. 80] as to the effect of the annulment decree [R. 33] on ownership (R. 61, Pr. XII), the effect of the witness Mead's testimony (R. 54-56) on conversion [R. 82-83], etc; that the record shows throughout the most inexact administration of justice, and the grossest injustice to your petitioner, which have resulted in his conviction of a base crime that has not been committed, nor proved at all, in a court that was absolutely without jurisdiction of the offense alleged; the said Court of Appeals has utterly ignored some of the most important points made and relied upon by your petitioner in both the trial and appellate courts, and it has in various instances stated only the minor facts of your petitioner's contentions, denied them, and left the major unnoticed, so that its said opinion does not fairly state or represent the case made by the record, but is a familiar alien presentation thereof.

19. That in this case the appellate court holds [R. 80, 81] that "The Washington Beneficial Endowment Association, a body corporate," named in the said third count of the indictment (R. 1-2) as the owner of the said money, was, at the time of the alleged conversion (whenever that was), both such owner and body corporate; but in 1896 the Supreme Court of the District of Columbia, in the said equity cause 15907, on plenary proof decided directly and in express terms (R. 52-53) that it was not such owner after, and that it was dissolved as a body corporate on, August 9, 1894; that court reiterated this ruling (R. 35-36) in the same case on (R. 37) June 7, 1901; the first ruling was affirmed, and the opinion of said chancery court was adopted in full as part of its own opinion, by said Court of Appeals (R. 52-53) on March 1, 1897 (10 App. D. C. 316, 338, 342-343, 357-358); the second ruling was also affirmed by said Court of Appeals on March 3, 1903 (21 App. D. C. 344, 353-355, 367), but the decree was reversed on another point (368-369), and the court said (p. 367): "The Endowment Association • • • has gone out of existence."

That the uncontradicted record evidence in this case (R. 30, bill; 33, decree; 35-36, Auditor's reports; 44-45, deed; 47, decree; 52,

opinion of Judge Cox; 53, opinion of Court of Appeals) and the parol testimony show affirmatively that said Association's alleged ownership and corporate existence both ceased absolutely on August 9, 1894; and that on and after said date the Association's vendee, The Commercial Alliance Life Insurance Company, a body corporate, of New York, and later its receiver William T. Gilbert, became and were the owners until the anulment decree (R. 33) of June 27, 1896, in behalf only of said Association's creditors, from which time the distributees named (R. 35-36) in the sixth count of the indictment became and remained such owners, and as such they have in truth and in fact received the money mentioned in this indictment, as ordered by the final decree (R. 47-48); and your petitioner verily believes that if his conviction had been based upon any one of the other remaining three counts of the indictment the said Association would not have been held to be either the owner or a body corporate.

That the said trial court instructed the jury (R. 61, Pr. XII) that the said annulment "decree of the 27th of June A. D. 1896, revested no title to the real estate that was sold by the receivers, or to the proceeds thereof, in the Washington Beneficial Endowment Association;" and there was no contention whatever that its ownership did not pass absolutely to its said vendee in 1894 by its deed that was set aside two years later by the said decree [R. 33] in behalf of its creditors only, nor that it afterwards ever regained or held such ownership otherwise than under and by virtue of said decree, but it was claimed strenuously that it did regain the ownership of the proceeds by force of the said decree.

20. That another question of general importance is whether the omission in an otherwise regular bill of exceptions to recite in terms that it (R. 28-71) contains the substance of all the evidence offered by the government is fatal to its being so taken in the appellate court; that the Court of Appeals [R. 82] holds (34 W. L. R. 382, 386) that this bill is fatally defective for such omission and "can not be so taken [to contain the substance of all the evidence offered by the government] because it is apparent from the charge of the court that certain letters of the defendant were offered," etc., "and the same are not recited or mentioned in the bill of exceptions;" but the letter is in fact twice recited and mentioned in the bill (R. 53, bottom, and R. 64, bottom); the ruling of said court that this bill is fatally defective for said omission is in direct conflict with Clyatt *vs.* United States, 197 U. S. 207; its ruling that the charge controls the bill is in conflict with the decisions of this and other courts, and with its own prior ruling in Gassenheimer *vs.* United States, 26 App. D. C. 432, 447; and as to these rulings there should be uniformity of decision in the federal courts.

That the bill of exceptions is regular and does in fact contain and it truly recites the entire substance of all of the evidence offered by the government in any wise connected with and having relation to the exceptions or any of them, and it was so stipulated and agreed in writing in the trial court by the then attorney for the government.

21. That the said indictment (R. 1-2) is fatally defective in substance in that it omits the particulars of the alleged receivership and fraud and conversion, and gives no description of the property or money involved; that these (R. 1-4, demurrer, R. 19-20, motion in arrest) and many other questions of importance are presented by this record, and considered in your petitioner's brief herein on the merits, but it would unduly prolong this petition to recite them; and being advised that enough has been shown hereby to entitle your petitioner to the writ of certiorari if the said writ of error shall be found untenable, in such event he humbly prays as follows:

PRAYER.

That the writ of certiorari may be issued out of and under the seal of this court, directed to the said Court of Appeals of the District of Columbia, commanding that court to certify and send to this court, on a day certain, to be therein designated, a full, true and complete transcript of the record and of all proceedings of the said Court of Appeals, to the end that this cause may be reviewed and determined by this court, as provided in said section 234 of said code; that the said return to the said writ of error herein may then be ordered to stand as the return to such writ of certiorari; that your petitioner may have such other and further relief or remedy in the premises as to this court may seem just and proper, and in conformity with the said act; and that the said judgment of the said Court of Appeals in this case, and every part thereof, may be reversed by this court, and the cause remanded with the directions proper in the premises.

And, as in duty bound, your petitioner will ever pray.

THOMAS M. FIELDS.

HENRY E. DAVIS,
JOHN C. GITTINGS,
FRANK J. HOGAN,
Attorneys for Petitioner.

JURAT.

DISTRICT OF COLUMBIA, ss:

Thomas M. Fields, having been first duly sworn, deposes and says that he has read the foregoing petition by him subscribed; that he

knows the contents thereof; and that the matters and things therein set forth are true.

THOMAS M. FIELDS.

Subscribed and sworn to before me this 13th day of October, A. D. 1906.

BESSIE B. SHEEHY,
Notary Public, D. C.

[NOTARIAL SEAL.]

MEMORANDUM.

Code D. C., section 234, which is simply the Act of March 3, 1897, carried forward, provides as follows:

> "In any case heretofore made final in the court of appeals it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to said Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to said Supreme Court."

This Act is in substantially the same language [as to certiorari] as section 6 of the Act of March 3, 1891, establishing the federal Circuit Courts of Appeals.

In the following criminal cases this court has granted writs of certiorari under this Act to the Court of Appeals of the District of Columbia, and reversed its judgments: Winston *vs.* United States, Strather *vs.* United States, and Smith *vs.* United States, all reported in 172 U. S. 303, and 171 U. S. 690 (in each of which the only question was the construction of the Act of Congress giving juries the right to render qualified verdicts in capital cases.) Cadarr *vs.* United States, 197 U. S. 475 (in which the only question was the construction of Code D. C., section 939, concerning abandonment of prosecution of criminal cases for failure of the grand jury to indict or ignore within nine months).

The instant case involves several questions of the same nature and of equal importance, and others of much greater gravity, as is shown by our petition for the writ of certiorari. These questions are fully discussed in our brief on the merits.

The practice of filing a petition for the writ of certiorari, if there be any doubt as to the juriadiction of this court, where the case is here on error or appeal, was followed and approved in Security Trust Co. *vs.* Dent, 187 U. S. 237, 239, Burton *vs.* United States, 196 U. S. 283, 295, and Whitney *vs.* Dick, 202 U. S. 132, 134.

The writ of certiorari will be granted (1) in order to secure uniformity of decision, or (2) where questions of imporatnce are involved. Forsyth *vs.* Hammond, 166 U. S. 506, 512, 514, 515. American Construction Co. *vs.* Jacksonville Ry. Co., 148 U. S. 372, 383.

Lau Ow Bew *vs.* United States, 144 U. S. 47, 58. Hubbard *vs.* Soby, 146 U. S. 56, 60. United States *vs.* Rider, 163 U. S. 132, 139. *In re* Woods, 143 U. S. 202, 206. Columbus Watch Co. *vs.* Robbins, 148 U. S. 266, 269, 270.

Our petition not only shows direct conflict of opinion between appellate federal courts, on the same serious questions, but also presents a grave question of the jurisdiction of the trial court, and other questions of importance, some of which are far-reaching in effect and of constant recurrence.

The writ of certiorari is also granted in contempt cases, in the absence of any other adequate remedy, because such judgments are not reviewable here on error or appeal. *In re* Tampa Ry. Co., 168 U. S. 583, 587. *In re* Chetwood, 165 U. S. 443, 462. *In re* Debs, 158 U. S. 564, 573. Hayes *vs.* Fischer, 102 U. S. 121. We insist that the trial court was absolutely without jurisdiction of the alleged offense in this case.

Our petition could not have been filed here at the last term, because this court adjourned on May 28, 1906, while the Court of Appeals did not decide our motion for a rehearing until June 7, 1906; and we are therefore in due time. The Conqueror, 166 U. S. 110, 114.

If this case has been improperly brought up by the writ of error to the Court of Appeals D. C., this court should grant the writ of certiorari to said court, and in such case the copy of the record filed under the writ of error should be directed to be taken and deemed a sufficient return to the certiorari. Security Trust Co. *vs.* Dent, 187 U. S. 237, 239. Whitney *vs.* Dick, 202 U. S. 132, 134.

The practice of submitting the petition for certiorari on the hearing of the writ of error or appeal was followed and approved in Security Trust Co. *vs.* Dent, *supra*, and Burton *vs.* United States, 196 U. S. 284, 295.

The consideration that this judgment is conclusive (United States *vs.* Three Copper Stills, 47 Fed. Rep. 495), of the petitioner's absolute forfeiture to the United States of "all right or claim to any commissions, costs, and charges," amounting to $10,070.82 (R. 36), also affords a powerful reason why the writ of certiorari should issue.

If the writ of error does not lie, the writ of ***habeas corpus*** from this court does, as the trial court was without jurisdiction, for the reasons stated in our petition for certiorari; and this furnishes an additional reason why the broad writ of certiorari under the statute should issue in preference to the narrower writ of ***habeas corpus***.

We endeavor elsewhere to show that this court has jurisdiction on the writ of error; but if we be wrong in this, then we earnestly ask that the writ of certiorari may go, and that the record filed under

the writ of error may be ordered to stand as the return to the certiorari.

Respectfully submitted,

HENRY E. DAVIS,
JOHN C. GITTINGS,
FRANK J. HOGAN,
Attorneys for Petitioner.

Washington, D. C., October 13, 1906.

[NOTE.—Since the foregoing petition was filed on October 16, 1906, the record returned under the writ of error in this case has been fully printed, and the opinion of the Court of Appeals has been officially reported in 27 App. D. C. 433. Additional references have, therefore, been added in brackets].

FILE COPY.

FILED.
JAN 7 1907
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1906.

No. 395.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

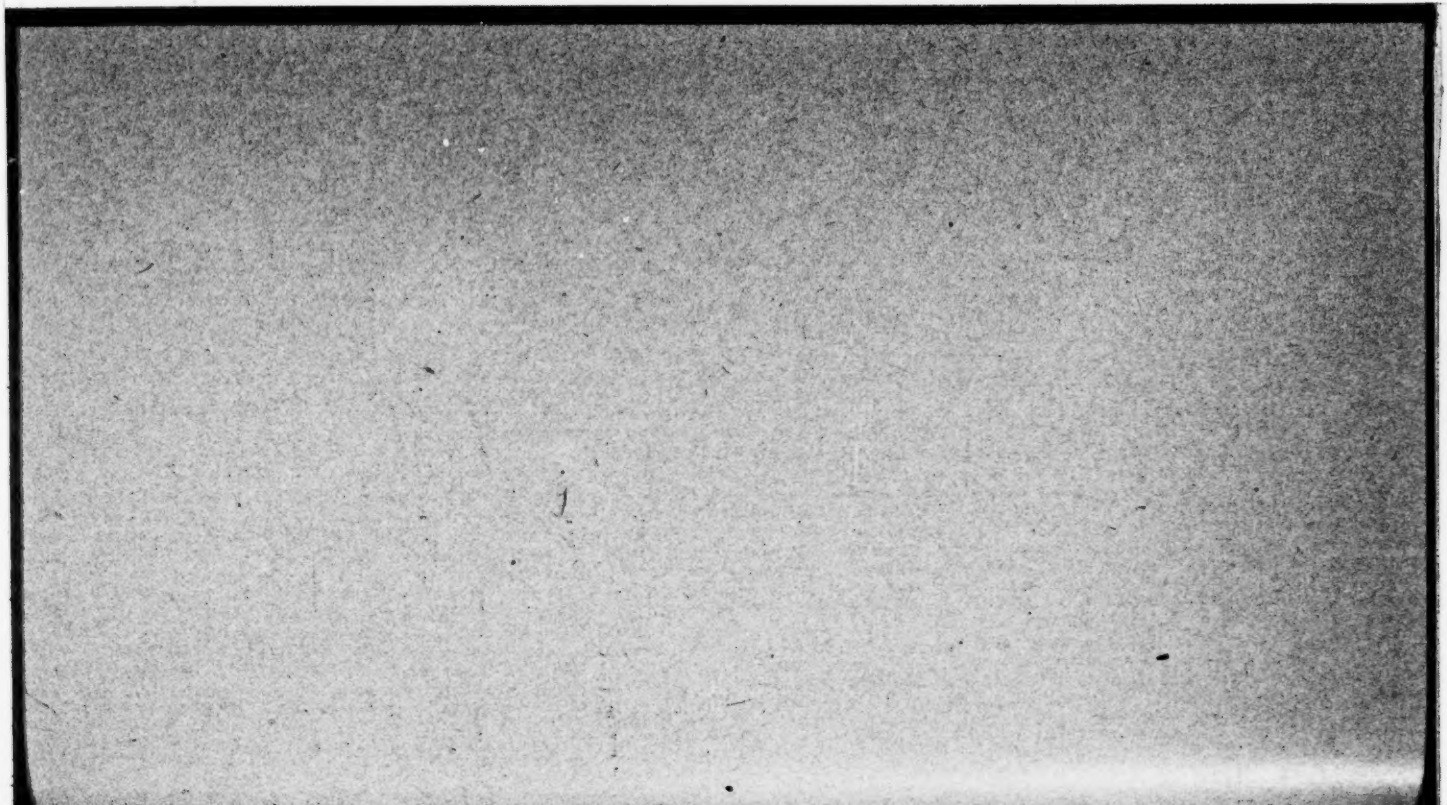
IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

FRANK J. HOGAN,
JOHN C. GITTINGS,
Attorneys for Plaintiff in Error.

HENRY E. DAVIS,
Counsel.

HAYWORTH PUB. HOUSE, WASH., D.C.



In the Supreme Court of the United States

OCTOBER TERM A. D. 1906.

THOMAS M. FIELDS,
Plaintiff in Error,
vs.
THE UNITED STATES.

No. 395.

BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS.

JURISDICTION IN ERROR.

In reply to the motion of the defendant in error to dismiss this case for want of jurisdiction, we respectfully submit the following:

(1) The matter in dispute in this case is whether the plaintiff in error, as a chancery receiver, is subject to a prosecution ending in a sentence depriving him of and operating to "forfeit all right or claim to any commissions, costs, and charges" on the receivership fund, which commissions, etc., amounting to $10,070.82, had been fully earned, and finally allowed by the chancery court, before the prosecution was begun, and more than $9,300 of which had been so earned and allowed before the statute upon which the prosecution is based took effect (R. 36, 37, 48); and this, too, under a law which confers upon the trial court absolutely no jurisdiction whatever of the charge alleged, but which is even unconstitutional and void when judicially enlarged by retrospective construction to include the receivership fund involved in this case.

(2) The plaintiff in error and Lipscomb had been appointed (R. 31) chancery receivers by the Supreme Court of the District of Columbia on November 6, 1894, and had come into possession of certain money ($21,233.10) on June 28, 1895 (R. 37), and certain other money making a total of $24,415.13 (R. 36), and the further sum of $1,532.26 (R. 36). On March 3, 1901, Congress passed an

act to establish a code of laws for said District, to take effect ten months in the future—from and after January 1, 1902—and section 841 thereof is as follows:

> "Sec. 841. **Executors and Other Fiduciaries.**—Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, *shall forfeit all right or claim to any commissions, costs, and charges thereon*, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

Under this section said receivers were indicted (R. 1-2) in said court on April 3, 1905, for the alleged embezzlement of a paper-stated but unsegregated balance ($15, 974.07) of said money on November 23, 1903. Before said act was passed they had fully earned and had been allowed but not paid from said fund by said court (R. 36) commissions, costs, and charges to the amount of $9,324.39; and before said indictment they had fully earned and had been allowed but not paid from said fund by said court (R. 36, 48) additional commissions, costs and charges to the amount of $746.43, making a total of $10,070.82, to which extent they become joint owners of said fund. No money whatever came into their possession (R. 77) or that of either of them after said code was passed; and there is no money whatever involved in this prosecution except the said balance of that which had come into their possession as aforesaid, and the said commissions, costs and charges thereon. On May 8, 1905 (R. 29), the plaintiff in error was simply railroaded to conviction under said indictment, but several months later his co-receiver was properly tried and promptly acquitted. The conviction was affirmed by the Court of Appeals (R. 85) on May 1, 1906. The right or claim of the plaintiff in error to said commissions, costs and charges goes to all of them—the whole sum of $10,070.82—and not merely to one-half thereof; but even if not, one-half exceeds $5,000. Construed retrospectively, as in this case, the said act is

unconstitutional and void by reason of its forfeiture clause. The writ of error was sued out under section 233 of said code, reading as follows:

> "Sec. 233. Any final judgment or decree of the court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

The forfeiture under section 841 is not merely of some right or claim to some commissions, etc., but "all right or claim to any" of them; nor is the forfeiture confined merely to commissions, but it extends to "costs and charges," and hence operates to leave a fiduciary deeply in debt for proper costs and charges which he has duly paid, even under express orders of the appointing court, as in this case.

Under said section 841 the said commissions, etc., are involved in this case, and measure the value in money of the matter in dispute. It can even be said that *the commissions, etc., are themselves the matter in dispute* for the purpose of jurisdiction on this writ of error, even though in one sense an incident to the prosecution for embezzlement. We concede the doctrine of *Chapman* vs. *United States*, 164 U. S. 436, and *Sinclair* vs. *District of Columbia*, 192 U. S. 16, that if this statute and proceeding involve only the bare question of guilt or innocence of the elemental act as a crime, this court has no jurisdiction on the writ of error, because in such event the matter in dispute is incapable of pecuniary estimation; but by the imperative terms of the statute itself, and the necessary effect of the judgment (if valid), the instant case presents as the matter in dispute one that is not only capable of pecuniary estimation, but has

actually been so estimated to the very penny (R. 36); whereas the *Chapman* and *Sinclair* cases were utterly devoid of this essential element.

While the mere guilt or innocence of the accused is ordinarily a matter that is incapable of pecuniary estimation, yet the statute can make it otherwise. Under section 841 the guilt and forfeiture are inseparable—the one cannot arise or exist without the other. The forfeiture is purely pecuniary, and can be said to make *the guilt or innocence a matter in dispute that is capable of a money valuation,* and moreover fixes this value as the amount of the commissions, costs and charges to which the accused is entitled. As a penal statute, section 841 is *sui generis* in more respects than one, while its re-editing by the lower courts fairly ruptures the law, the language, and the mental ligaments of the lawyer and layman, the lexicographer and philologist.

In denying a motion to dismiss an appeal from the Court of Appeals D. C., in *Shappirio* vs. *Goldberg,* 192 U. S. 232, 240, this court said:

> "To ascertain the right of jurisdiction • • • we look not to a single feature of the case, but to the entire controversy between the parties."

In *Smith* vs. *Whitney,* 116 U. S. 167, Smith, a Paymaster in the Navy, filed a petition in the Supreme Court of the District of Columbia for a writ of prohibition to the Secretary of the Navy and to a general court-martial convened by his order to try the petitioner on certain charges and specifications. Under the first charge were fourteen specifications, among which were alleged acts which constituted crimes under the laws of the United States and subjected the petitioner, if guilty, to imprisonment in the penitentiary, to dismissal from the service, and, as the direct result, the loss of salary of his office. Smith denied the jurisdiction of the court-martial to try him for any of the various offenses alleged in the charges and specifications, but his plea was overruled, and this was the basis of his application to the D. C. Supreme Court for a writ of prohibition. His petition was dismissed by that court, and he took an appeal from the judgment and also sued out a writ of error to reverse it.

In this court a motion was made to dismiss for want of jurisdiction. The court said (p. 173):

> "The final judgment or decree of the Supreme Court of the District of Columbia in any case in which the matter in dispute, exclusive of costs, exceeds the sum of $5,000 may be reviewed and reversed or affirmed in this court upon writ of error, if the judgment is at law, or upon appeal, if the decree is in equity.
>
> "The objection founded on *Kurtz* v. *Moffitt*, 115 U. S. 487, and cases therein cited, that this court has no appellate jurisdiction of the present case, because there is nothing in dispute the value of which can be estimated in money, cannot be sustained. The matter in dispute is whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service and depriving him of a salary as Paymaster-General during the residue of his term as such, and as Pay-Inspector afterwards, which in less than two years would exceed the sum of $5,000. * * * The case cannot be distinguished in principle from those in which it has been held that a judgment awarding a peremptory writ of mandamus to admit one to an office, or a judgment of ouster from an office, might be reviewed by this court upon writ of error, if the salary during the term of the office would exceed the sum named in the statute defining its appellate jurisdiction."

So in this case, the matter in dispute is whether the plaintiff in error, as a chancery receiver, is subject to a prosecution ending in a sentence depriving him of "all right of claim to any commissions, costs and charges" as receiver, amounting to $10,070.82; or such commissions, etc., themselves can be considered as the matter in dispute for the purpose of jurisdiction. It is not the form, but the substance, of the proceeding that determines the matter in dispute. The statute controls absolutely the entire controversy. Property rights are often concluded in criminal cases (see *infra*), and criminal issues are often determined in civil cases as the basis of pecuniary claims. There is no hard and fast rule to prevent such proceedings and results, especially when based upon statutes.

Smith vs. *Adams*, 130 U. S. 167, was an appeal from Dakota Territory, and involved an election contest. On motion to dismiss for want of jurisdiction, the court said (p. 175):

"It is conceded that the pecuniary value of the matter in dispute may be determined [1] not only by the money judgment prayed, where such is the case, but [2] in some cases by the increased or diminished value of the property directly affected by the relief prayed, or [3] by the pecuniary result to one of the parties immediately from the judgment. Thus a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected. * * * So in a case impeaching the right to an office, the amount of the salary attached to it is considered as determining the value of the matter in dispute. Thus in *Smith* v. *Whitney*, 116 U. S. 167, 173, where the application was for a writ of prohibition restraining proceedings by court-martial against an officer, an objection being taken to the appellate jurisdiction of this court that the subject matter of the suit was incapable of pecuniary estimation, the court, by *Mr. Justice Gray*, replied: 'The matter in dispute is whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary, as paymaster-general during the residue of his term as such, and as pay-inspector afterwards, which in less than two years would exceed the sum of five thousand dollars. * * * The case cannot be distinguished in principle from those in which it has been held that a judgment awarding a peremptory writ of mandamus to admit one to an office, or a judgment of ouster from an office, might be reviewed by this court upon writ of error, if the salary during the term of the office would exceed the sum named in the statute defining its appellate jurisdiction. * * *.'

"The acquisition or loss of the land in question is not a necessary consequence of the election for the county seat, such result not being created by law, but by a mere accident arising from a voluntary gift by Aberdeen made contingent upon the removal of the county seat to that place and its continuance there. In *Smith* v. *Whitney*, the salary was given by the law and went with the tenure of the office."

In the present case, the forfeiture of all right or claim of the plaintiff in error to any commissions, costs, and charges, *is* a neces-

sary consequence of the basic act which the judgment (if valid) conclusively establishes, such result being created by law, and not arising from a mere accident. These commissions, etc., were given as of right by the chancery court under the law, and went with the tenure of office of receiver. The forfeiture does not arise from any private or collateral agreement or condition, nor from any accident or incident, but flows imperatively from the law itself. It is not the judgment, but the statute, that produces the forfeiture on the commission of the elemental act. "No conviction or judgment shall work corruption of blood or forfeiture of estate." R. S. U. S., section 5326. Of course, as has often been decided, when a statute like section 841 declares a forfeiture on facts that have not already occurred, a judicial proceeding is necessary, under the federal Constitution, to determine whether the prescribed element exists which is to operate the forfeiture. The judicial proceeding necessary under section 841 is in form criminal, and perhaps that only. The judgment (if valid) simply stands as conclusive evidence that the basic fact upon which the forfeiture arises has been judicially determined to exist. In one sense, however, the judgment (if vadid) itself effects—and certainly perfects—the forfeiture; and this is undoubtedly true so far as jurisdiction to review such judgment is concerned. The distinction between a thing and the evidence of it affects not the substantial practical result to an interested party.

In *Stinson* vs. *Dousman*, 20 How. 461 (approved in *Shappirio* vs. *Goldberg*, 192 U. S. 232, 240), the action was brought to recover $481.16 as rent of a parcel of land, under a written contract by which Dousman agreed to sell the land to Stinson for $8,000. If Stinson defaulted, Dousman could declare the contract ended and recover as rent the interest agreed to be paid on the purchase money. Stinson did default, and Dousman sued and recovered judgment for $481.16, and costs, *containing only the usual recitals of a money judgment*. Stinson took out a writ of error. It was objected that this court had no jurisdiction because the matter in dispute was not of the value of $1,000, but the objection was overruled. The court said (p. 467):

> "The effect of the judgment is to adjust the legal and equitable claims of the parties to the subject of the suit. The subject of the suit is not merely the amount of the rent claimed, but the title of the respective parties to the land under the contract. The contract shows that

> the matter in dispute was valued by the parties at $8,000. * * * We think this court has jurisdiction."

In the case at bar, the *effect* of the judgment (if valid) is conclusively to adjust and establish the legal and equitable claims of the parties to the commissions, costs, and charges, and to fix the absolute forfeiture of them in favor of the United States and against the plaintiff in error. The subject of this prosecution is not merely the guilt or innocence of the accused, but there is in controversy the title of the respective parties to the commissions, etc., under the imperative forfeiture clause of the statute, amounting (R. 36) to $10,070.82, as affirmatively shown by the Government's own evidence.

In *McNeill* vs. *Southern Ry. Co.*, 202 U. S. 543, 558, it was held that where the controversy presented by the bill involves the right to enforce statutory penalties and forfeitures against the complainant, over the jurisdictional amount, this gives jurisdiction, though the dispute which was the origin of the controversy involved less, and no proceedings to enforce the penalties and forfeitures had been actually filed.

In *Scott* vs. *Donald*, 165 U. S. 107, 115, the bill was filed to enjoin the threatened seizure of liquors about to be imported by the complainant into South Carolina. The right so to import such liquors was held to be the matter in dispute for the purpose of jurisdiction; and this court also held that the complainant was not required to postpone his suit until his property to an amount exceeding the jurisdictional value "has been actually seized and confiscated."

So here, the accused is not required to wait until the Government has actually seized and physically confiscated his commissions, costs, and charges. The judgment (if valid) is conclusive of the absolute destruction of all his right or claim to any of them. No other judicial proceedings are necessary. A mere demand by the United States on the receivers, based upon this judgment (if valid), cannot lawfully be resisted, for the judgment (if valid) conclusively establishes the Government's right, title and ownership to all right or claim which the plaintiff in error had thereto, and the amount is fixed to a penny by the evidence. The statute is self-invoking and self-executing, and operates *ex proprio vigore* to transfer absolutely from the plaintiff in error to the United States "all right or claim" of the former to

these commissions, costs, and charges, *eo instanti* the basic act is committed. *United States* vs. *Stowell*, 133 U. S. 1, 16. *The Mary Celeste*, 16 Fed. Cas. 968, 969. *Pilcher* vs. *Faircloth*, 135 Ala. 311, 313. *United States* vs. *Olsen*, 57 Fed. Rep. 579, 586. 13 *Am. & Eng. Ency. Law*, 58, 59, 60.

> "When the object of the suit is not directly and expressly for the purpose of obtaining a money judgment, the amount involved is determined by the value in money of the relief to the plaintiff or the loss to the defendant should the relief be granted, or, *vice versa*, should the relief be denied. If the amount thus estimated is in excess of the lowest limit of appellate jurisdiction, the court will take cognizance." 2 *Cyc.* 544, 545. *U. S.* v. *Trans-Missouri Freight Association*, 166 U. S. 290, 310, 311 (bill seeking injunction and dissolution of an association of common carriers for the regulation of rates, and it was held sufficient to confer jurisdiction upon this court that it appeared that the saving in rates exceeded $1,000 per day.) *Harris* v. *Barber*, 129 U. S. 366, 369, 370 (possession of realty.) *Carter* v. *Cutting*, 8 Cranch. 251, 252 (if the probate of a will has any legal operation and is not merely void, the controversy as to the validity of the probate is a matter in dispute equal to the value of the estate devised away from those seeking to revoke the probate.) An appeal will lie from a judgment of forfeiture on a bail bond in a criminal prosecution, the matter of forfeiture being attracted to the criminal prosecution; and so also an appeal will lie where cash bail has been forfeited. 2 *Cyc.* 548, 549.

In *Troy* vs. *Evans*, 97 U. S. 1, a writ of error was sued out to review a judgment for less than $5,000. The bonds sued on were payable in instalments and amounted in all to more than $5,000, while the instalments due when the judgment was rendered were less. These bonds were held by the plaintiff only as security for a debt. It was contended that the Supreme Court had jurisdiction because the judgment would be conclusive in another action by the plaintiff on the bonds as to the liability of the defendants to the extent of the debt secured, *but it nowhere appeared that this debt exceeded $5,000.* A motion to dismiss for want of jurisdiction was granted and the court said (p. 3):

> "Conceding all that is claimed in the argument opposing this motion, to wit: that the judgment in this action will be conclusive in another by the present plaintiffs upon the same bonds as to the liability of the defendants upon the bonds to the extent of the debt of Jones, for which they are held, still our jurisdiction cannot be maintained, unless it also appears that this debt exceeds $5,000. * * * If jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount."

(3) If these commissions, etc., be in one sense an incident to the prosecution for embezzlement, still this court has jurisdiction.

Simms vs. *Simms*, 175 U. S. 162. Suit by husband against wife for divorce *a vin. mat.* Motion by wife, pending suit, for order for $5,000 counsel fees and suit money, but no order on same until final decision on merits. Bill dismissel, and by same decree wife awarded $5,250 for counsel fees and maintenance. Appeal by husband to Supreme Court of Territory, which affirmed. Appeal to the Supreme Court of the United States. Motion to dismiss for want of jurisdiction, because the decree concerned divorce and alimony only. The court said (p. 168):

> "So far as the question of divorce was concerned, the matter in controversy was the continuance or the dissolution of the status or relation of marriage between the parties, and the decree cannot be reviewed on this appeal; * * * because that was a matter the value of which could not be estimated in money.
>
> "The decree for alimony and counsel fees, although in one sense an incident to the suit for divorce, is a distinct and severable final judgment in favor of the defendant for a sum of money of a sufficient jurisdictional amount, and is therefore good ground of appeal."

De La Rama vs. *De La Rama*, 201 U. S. 303. Appeal from the Supreme Court of the Philippine Islands to review a decree which reversed a decree for divorce and alimony and directed that the complaint be dismissed. The suit was brought by the wife for divorce, division of marital property, alimony, counsel fees and

costs. The trial court granted her the relief prayed, together with the sum of about $84,000 for her share of the conjugal property and as an allowance for her support since the date of the institution of the suit. On reversal of this decree because of the proof of her own guilt of the crime of adultery, she appealed to this court to which the law gives appellate jurisdiction in all cases "in which the value in controversy exceeds twenty-five thousand dollars." Motion to dismiss for want to jurisdiction.

The court reiterates the rule that the federal courts have no jurisdiction on the subject of divorce, or for the allowance of alimony, either as an original proceeding, or an incident to divorce, because a suit for divorce in itself involves no pecuniary value; but holds that this rule does not apply to the jurisdiction of the courts of those places (including the District of Coulmbia?) wherein Congress has full legislative power over all subjects on which a state legislature can legislate within the State, nor to the appellate jurisdiction of the United States Supreme Court over those courts. The *Simms* case (175 U. S. 162) is then referred to at length, and the foregoing language quoted with approval, but attention is called to the fact that the appeal in that case did not involve the merits. The court says that the judgments and decrees of the Supreme Court of the Philippine Islands are reviewable on appeal or writ of error in the same manner as the final judgments and decrees of the circuit courts of the United States. The wife's right to a division of property, to alimony, counsel fees and costs, rested entirely upon the question whether she was guilty or innocent of adultery, and therefore on the proof on the subject of divorce. The court says that the hardship of denying an appeal in this case, as well as a review of the testimony upon the subject of divorce, is apparent; that for the purposes of jurisdiction it makes no difference whether the amount claimed be termed alimony or the wife's share of the community property; that it is sufficient that she claimed to be entitled to an amount exceeding $25,000, and that her claim was not baseless is shown by the first decree; but by the decree of the appellate court she was denied all recovery of any description upon the ground of her adultery; if, on a review of the testimony, it were found that she was not guilty of adultery, she would be entitled to one-half of the conjugal property. The court held the appeal properly taken, and that it called for a re-examination of the grounds on which the petition was denied; and

thereupon found that the proof did not show the wife's guilt, and reversed the decree appealed. As to passing on the sufficiency of the testimony authorizing or refusing the divorce, and showing her guilt or innocence, the court said (p. 310):

> "While, as indicated in *Simms* v. *Simms*, the decree for alimony, although in one sense an incident to the suit for divorce, is a distinct and final judgment for a sum of money, and is therefore a good ground for appeal from that part of the decree, yet, where the appeal is from the whole decree (as in this case), or even from a part of the decree, and the denial of alimony or separation of the conjugal property depends upon the evidence which bears upon the right to a divorce, we cannot determine that question without passing upon the sufficiency of the testimony authorizing or refusing the divorce. An appeal from the decree for alimony or other property right would be of no value whatever unless the facts connected with the allowance or refusal of such right were open to review in the appellate court. Although an appeal from a part of a decree does not bring up the part not appealed from, yet, if the whole decree must be reviewed in order to decide the appeal, such appeal brings up the entire record [citing cases]. The case is even stronger where the appeal is taken from the whole decree."

So in the instant case, though this court may have no jurisdiction of the embezzlement feature of the case as such, yet it has of the forfeiture feature, but it cannot determine the latter without passing on the sufficiency of the evidence of the former, because both points of the case rest upon exactly the same evidence; and this, therefore, opens the whole record and sets the matter at large.

(4) In *Callan* vs. *Wilson*, 127 U. S. 540, on appeal from the Supreme Court of the District to review an order refusing Callan's discharge, on *habeas corpus*, from custody under a sentence of the police court, convicting of conspiracy, this court took jurisdiction and reversed the judgment and discharged the prisoner, on the ground that the conviction was void because he had not been accorded his constitutional right of trial by jury.

U. S. ex rel. Steinmetz vs. *Allen*, 192 U. S. 543. Petition for mandamus in Supreme Court D. C., to compel Commissioner of Patents

to require primary examiner to forward petitioner's appeal to board of examiners in chief for review of ruling of primary examiner. Petition dismissed by Supreme Court D. C., and its judgment affirmed by Court of Appeals D. C. Writ of error to this court. Motion to dismiss for want of jurisdiction denied. The court reversed and said (p. 555):

> "The jurisdiction of this court to review the judgment of the Court of Appeals is questioned. There is no money in dispute, nor anything to which a pecuniary value has been given. * * * We think * * * we have jurisdiction and the motion to dismiss is denied."

(5) In the present case the statute itself defines the controversy between the parties, and imperatively requirees that the doing of the elemental act shall produce two results, one civil and the other criminal, viz: (1) "shall forfeit all right or claim to any commissions, costs, and charges thereon," and (2) "shall be deemed guilty of embezzlement * * * and shall be punished" by fine or imprisonment or both. The forfeiture is no part of the punishment of the act as a crime, but in terms is cut away from such punishment; yet the forfeiture is given only by this very statute, and the direct and immediate effect of this prosecution and judgment (if valid) is to establish the elemental fact from which it arises: and it is so necessarily and directly involved in this case that this judgment (if valid) is absolutely conclusive of it both in this and any other proceeding. *Judgments are never conclusive of matters not involved.*

The law confers no rights upon individuals, but only upon the United States. It does not declare the beneficiary of the forfeiture, and it therefore goes exclusively to the United States that enacted the statute. 13 *Am. & Eng. Ency. Law* 69. This forfeiture is a matter solely between the parties to this case. The Government can no more waive it (which it has not done) than the plaintiff in error can avoid it. The statute is mandatory. The forfeiture follows the commission of the basic act, and its establishment by this judicial proceeding (if valid), as certainly as does the punishment prescribed. *Ita lex scripta est.*

The act provides no special remedy by which the forfeiture is to be enforced. The revenue laws involved in *Coffey* vs. *United States*, 116 U. S. 436 (1886), provided for criminal prosecution and for

forfeiture, but declared that (R. S. U. S. Sec. 3453) "the proceedings to enforce such forfeiture shall be in the nature of a proceeding *in rem.*" Coffey was prosecuted criminally and acquitted. The Government then proceeded against the property seized, by information *in rem* to enforce the forfeiture. Coffey intervened as claimant and pleaded his acquittal in bar, but the trial court held it no bar. This court reversed and held (syllabus):

> "A judgment of acquittal in a criminal prosecution for a violation of the internal revenue laws is conclusive in favor of the defendant, as claimant of the property involved in a subsequent suit *in rem*, when, as against him, the existence of the same act or fact involved in the criminal prosecution is in issue as a cause for the forfeiture of such property."

The *Coffey* case was carefully considered in *United States* vs. *Three Copper Stills* (1890), 47 Fed. Rep. 495, and the court said (p. 497):

> "Although the court in that case [*Coffey* v. *United States, supra,*] declined to express an opinion as to whether a conviction on an indictment under section 3257 could be availed of as conclusive evidence in law for a condemnation in a subsequent suit *in rem* under that section, it must necessarily follow from the reasoning of the court that if an acquittal is conclusive on the United States, *a conviction must be conclusive on the convicted claimant.*"

In the *Coffey* case the court expressly left open (p. 444) the questions (1) whether a judgment of conviction in a criminal prosecution is conclusive against the accused as claimant in a subsequent suit *in rem* to enforce the forfeiture, and (2) whether a judgment of forfeiture is conclusive against the claimant in his subsequent criminal prosecution.

The court adverts (p. 445) without express approval or comment to the facts and decision in *United States* vs. *McKee*, 4 Dill, 128, (1877). McKee was convicted and punished for conspiracy with certain distillers to defraud the United States of taxes on spirits. Afterwards the Government brought an action against him under another section, to recover double the amount of the taxes lost by the conspiracy and fraud. The two transactions were one. The

court held that the action for the penalty was barred by the criminal judgment and punishment, as he could not be twice punished for the same offense.

The reason and result of the later cases are contrary to the *McKee* case. *United States* vs. *Three Copper Stills* (1890), 47 Fed Rep. 495, 499. *Matter of Leszynsky* (1879), 16 Blatch, 9, 13. *United States* vs. *Olsen* (1893), 57 Fed. Rep. 579, 583. See also *United States* vs. *Schneider*, 35 Fed. Rep. 107, 108 (1888). In the *Three Copper Stills* case it is pointed out (p. 500) that this court in the *Coffey* case did not adopt the reason of the *McKee* case, but the inference to be drawn from the language used "is rather that there could be a subsequent suit *in rem*, or a subsequent indictment, as the case might be."

The first question left open in the *Coffey* case has since been directly decided in the affirmative in *United States* vs. *Three Copper Stills, supra,* involving a forfeiture under the revenue laws, in which it was held that a conviction on an indictment is conclusive against any claim of the accused to the property seized (pp. 496-497) "but the sentence of forfeiture did not follow upon this conviction under this indictment, because Congress has provided another mode of procedure. * * * A proceeding *in rem* is necessary to declare and perfect the forfeiture. See Section 3453 R. S. U. S. Rule 22, Admiralty Rules."

The court (pp. 498-499, 500) notes the important fact that under a statute like section 841 here involved, the forfeiture does not arise except on guilt of the very offense denounced—no forfeiture can arise or exist without or apart from the defendant's guilt, but they are inseparable. This is not a case where the thing can be guilty, and the person innocent. How can we strip section 841 of the element of forfeiture any more than of guilt or punishment? How can it be said that guilt is involved but forfeiture is not? We must take the statute in its entirety as we find it, or let it alone altogether. It cannot be split up or emasculated to suit anybody or for any purpose.

The *Coffey* case was approved in *Boyd* vs. *United States,* 116 U. S. 616, 634 (1886), *Zucker* vs. *United States,* 161 U. S. 475, 478 (1896), and *Stone* vs. *United States,* 167 U. S. 167, 178, 184-188 (1897). The *Stone* case was an action to recover the value of certain timber unlawfully cut from government land in Idaho. Stone pleaded that

he had been indicted for cutting such timber, and acquitted, and relied on the *Coffey* case. This court held his plea bad, and pointed out that the *Coffey* case decided that the same facts could not be relitigated "as the basis of any statutory punishment," etc., while the action against Stone was merely one by the United States as the owner to recover for the value of its property cut and taken by him.

In *Forsyth* vs. *Hammond*, 166 U. S. 506, 518, this court said:

> "Though the form and causes of action be different, a decision by a court of competent jurisdiction in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions."

This judgment (R. 26-27) does not recite nor declare the forfeiture in terms, but it might well have done so without affecting its validity, since the statute has provided no special remedy to establish it. *Miller* vs. *State*, 149 Ind. 607, 620 (1898). *Vowells* vs. *Commonwealth*, 84 Ky. 52, 55 (1886). *Commonwealth* vs. *Pennock*, 3 S. & R. 199 (1817). *Schuler* vs. *State*, 160 Ind. 300, 301, 310 (1903). 19 *Ency. P. & P.* 483. *Paley on Convictions* (London, 1904), 276, 277. *Burton* vs. *United States*, 202 U. S. 344, 369. The mere fact that the judgment does not recite the forfeiture in terms has no force whatever to exclude it from this controversy, since the statute requires it. These authorities so show. The law, not the mere form of the judgment, fixes the matter in dispute in this case. The effect of the judgment controls, not its bare recitals.

If the forfeiture statute prescribes a special remedy, that is exclusive; but if not, the forfeiture can be judicially established by criminal information or indictment. Sec. 841 provides no special procedure to establish judicially the fundamental fact which operates the forfeiture, but it is attracted to and is to be established by indictment, as in this case. This prosecution and judgment (if valid) conclusively establish the forfeiture judicially, as against the plaintiff in error and in favor of the United States. If it cannot be reviewed in this case, it can never be in any other, if valid.

The customs revenue statutes and the maritime laws generally require seizures and civil proceedings *in rem* to establish the forfeiture prescribed. They apply to tangible property. But where the law prescribes (as does section 841) a pecuniary forfeiture of "all

right or claim," etc., rather than a specific tangible property forfeiture, as one of the results of the omission or commission of a certain act also made a criminal offense, especially by the same law, the proper proceeding to establish such forfeiture is a criminal prosecution by and in the name of the United States, unless the statute provides a different and exclusive remedy. *Ransdell* vs. *Patterson*, 1 App. D. C. 489, 495. *U. S.* vs. *Moore*, 11 Fed. Rep. 248, 250, 251. *U. S.* vs. *Craft*, 43 Fed. Rep. 374, 375. *U. S.* vs. *Bougher*, 6 McLean 277, 280, 281. *U. S.* vs. *Nash*, 111 Fed. Rep. 523, 528, 529. *U. S.* vs. *Mattingly*, 26 Fed. Cas. No. 15743. *U. S.* vs. *Hoskins*, 5 Mackey, 478, 480. *U. S.* vs. *Ebert*, 25 Fed. Cas. No. 15019. R. S. U. S. sections 1041, 3213.

The forfeiture of section 841 is purely pecuniary, and the Government has affirmatively proved its exact amount—$10,070.82—in this case (R. 36). The statute requires it imperatively, and it is therefore impossible to prosecute under this law without directly involving this pecuniary matter. Both the pecuniary or property rights of the plaintiff in error are as certainly and directly involved in this case as his guilt or innocence of crime. A proceeding in form criminal is proper (if not necessary) to establish this forfeiture. Its omission from the recitals of the judgment are not material as to what is involved, nor can such omission change the matter in dispute nor defeat the writ of error, even though so intended. The statute and the effect of the judgment still control. The forfeiture is not, in the eye of the law or in fact, any part of the punishment of the basic act as a crime *(sic)*. The law itself is so worded, the Court of Appeals so holds (R. 84), and the Government so argues in the brief on the motion to dismiss (p. 8).

(6) In so far as the statute and this proceeding and judgment are intended to operate a forfeiture of the vested rights or claims of the accused to the commissions, costs and charges which had been adjusted and allowed him before the code, amounting to about $10,000 (R. 36), the law is invalid because in plain violation of the federal Constitution; in which aspect of the case the writ of error will lie to review this judgment, without regard to the sum or value of the matter in dispute, under Code D. C. Sec. 233, *supra*.

In *Territory of New Mexico, ex rel. McLean & Co.*, vs. *Denver & R. G. Ry. Co.*, 203 U. S. 38, 47, the question of the jurisdiction of this court over a judgment of the Supreme Court of that Territory

under the Act of March 3, 1885, 23 Stat. L. 443, was under consideration on a motion to dismiss the appeal. This act formerly applied to the Supreme Court of this District as well as to the territorial courts, and our present law—Code D. C. Sec. 233, quoted *supra*—is merely a substantial re-enactment of it. The proceeding was *mandamus* to compel a common carrier to receive for transportation beyond the territorial limits, hides which did not bear the evidence of inspection required by a territorial act made in pursuance of authority of Congress, but which it was insisted by the appellant was null and void as in contravention of the federal Constitution.

The motion to dismiss was denied on the grounds that the validity of an authority exercised under the United States was drawn in question, the matter in dispute was the right to have the goods transported, and this right was measurable in money, though the amount involved was confessedly less than $5,000.

(7) Certain erroneous statements of fact have inadvertently crept into the brief of the learned Solicitor General. After stating how the questions of the constitutionality or validity of the statute, and its construction and application, were directly raised by us in both courts below, he says (p. 7) that the record affirmatively shows (R. 34-36) that all commissions, costs and charges, amounting to about $10,000, had been allowed and paid to the receivers long before the finding of the indictment; but the record shows only the allowance in full, and not the payment in full, unless the Government concedes that all of the acts of alleged embezzlement (R. 38-41) were not embezzlements, but proper payments. Even if paid, the statute surely forfeits the right to retain them, because it does not distinguish between paid and unpaid commissions, etc. On the contrary, it expressly includes "all" right or claim to "any" of them, thus applying to both the paid and unpaid. One can forfeit only that which he has, not that which he has not.

He further says (p. 7) that the indictment charges the receivers with the embezzlement of the net sum remaining for distribution; but there was no net sum except on paper—by a mere statement of account. There was no actual segregation of the sum charged in the indictment, but it was and remained a part of the gross amount received (R. 36).

He further adds (p. 7) that "the testimony all relates to the conversion of the net sum chargeable against the receivers exclusive

of commissions, charges and costs;" but the record clearly and conclusively shows (R. 38-41) that the testimony concerning the alleged conversion relates indiscriminately and without any election to every payment or disbursement ever made at any time or for any purpose by the receivers from July 6, 1895, to a date subsequent to the indictment date, without anything to show to whom or for what purpose or by what authority or want of authority such payments or disbursements were made (except in two instances), and only with loose and general reference to the gross sum received, and with no special reference at all to the net sum charged. The two excepted instances (R. 39, bottom) of $210 and $248.43, speak for themselves.

He also says (pp. 8-9) that in the recent case of *Burton* vs. *U. S.*, 196 U. S. 283, under R. S. 1782, which provides that persons convicted thereunder shall be incapable of holding any office under the United States, there was no inclusion of the forfeiture in the judgment. This is true; but in the more recent case of *Burton* vs. *U. S.*, 202 U. S. 344, 369, under the same statute, there was an inclusion of the forfeiture in the judgment.

The Government is not at liberty, as contended, to invoke any one or more of the provisions of section 841, and reject the rest, at its option; but it must take the statute as an entirety or not at all; otherwise it would have the right to make the law; and if it has such right, then the accused must also have it; and thus the law as enacted by Congress would become subject to the will of the parties to the particular proceeding.

We admit the doctrines of all the cases cited by the Government; but they do not control this case, because the vital element absent in each of them is present here, namely, a matter directly in dispute that is capable of pecuniary valuation.

Why did the prosecution take such special pains to prove (R. 36) all of the details of the commissions, costs, and charges, even to the very penny? Was this mere pastime? Or was it for the purpose of conclusively establishing the forfeiture, and showing the exact amount of it, so as absolutely to deprive the accused by this proceeding and judgment of "all right or claim to any commissions, costs, and charges" on the receivership fund? How can it be consistently

claimed that the forfeiture is a matter directly in dispute in this case for every purpose except the jurisdiction of this court?

(8) The exact jurisdictional question now presented does not appear to have been decided by this court. On October 16, 1906, we therefore filed in this case our petition that the writ of *certiorari* issue if the writ of error be untenable (which it is not), and this petition will be submitted with the motion to dismiss. The consideration that this judgment (if valid) is conclusive of the forfeiture, affords of itself a powerful reason for the writ of *certiorari*, if the case be improperly here on the writ of error.

Our contention that the trial court had absolutely no jurisdiction whatever of the alleged offense and fund involved in this case is presented elsewhere in detail; as is also our claim that the statute is unconstitutional and void by reason of its forfeiture clause, when construed retrospectively (as in this case) to include the same.

We think this court has jurisdiction on the writ of error, and respectfully submit that the motion to dismiss should be overruled.

In view of the premises, and the important questions presented by this record and the petition for *certiorari* in this case, it may not be improper to suggest that the determination of both the motion to dismiss and the petition for *certiorari* be postponed to the hearing on the merits.

Respectfully submitted.

HENRY E. DAVIS,
Counsel.

FRANK J. HOGAN,
JOHN C. GITTINGS,
Attorneys for Plaintiff in Error.

Washington, D. C.,
January, 1907.

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IN THE

Supreme Court of the United States

OCTOBER TERM A. D. 1906.

Office Supreme Court, U. S.
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No. 395.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

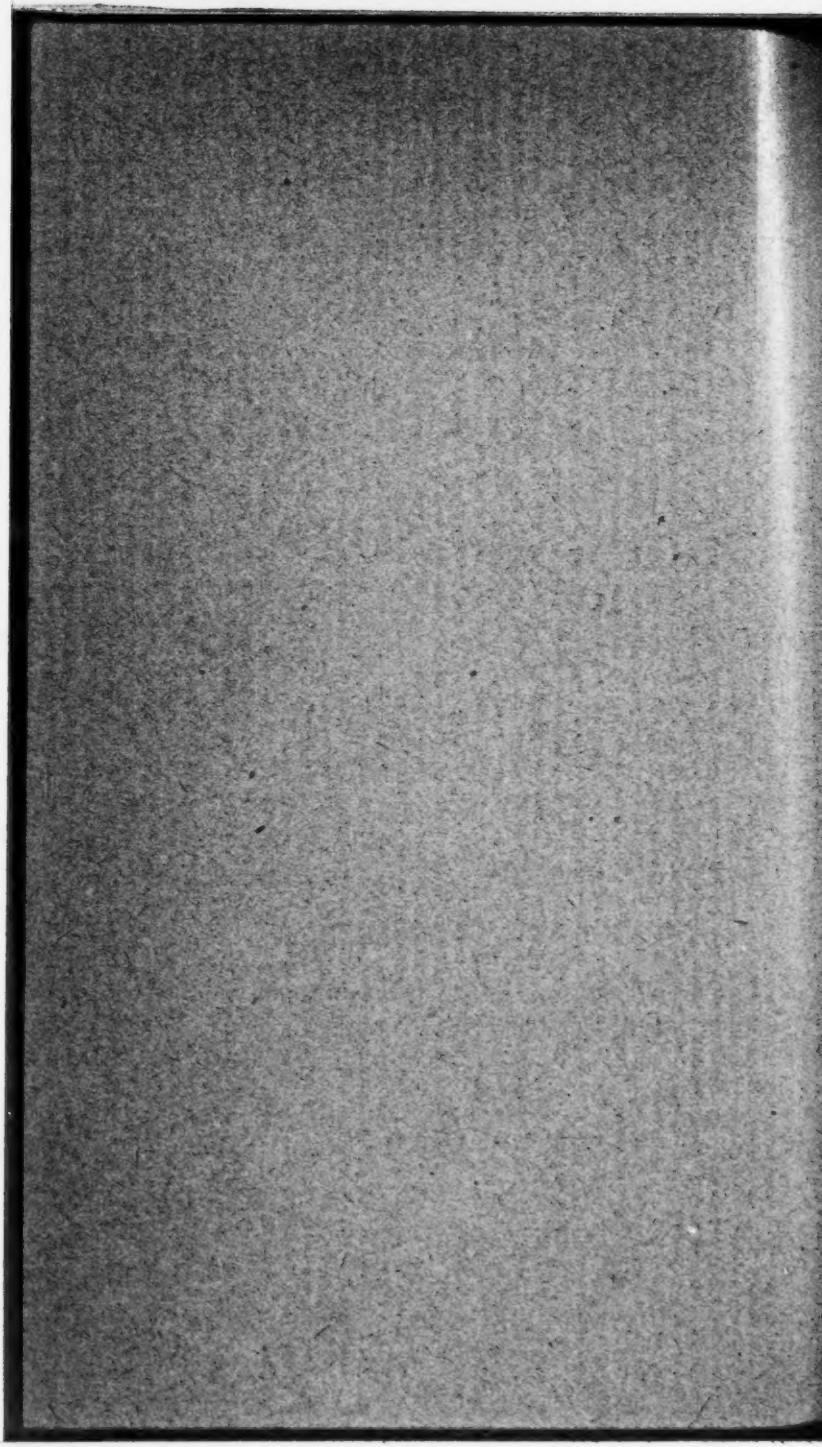
IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FRANK J. HOGAN,
JOHN C. GITTINGS,
Attorneys for Plaintiff in Error.

HENRY E. DAVIS,
Counsel.

HAYWORTH PUB. HOUSE, WASH., D.C.



In the Supreme Court of the United States

OCTOBER TERM A. D. 1906.

THOMAS M. FIELDS,
Plaintiff in Error,
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THE UNITED STATES.

No. 395.

In Error to the Court of Appeals of the District of Columbia.

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the Supreme Court of the United States

OCTOBER TERM A. D. 1906.

THOMAS M. FIELDS,
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vs.
THE UNITED STATES.

No. 395.

In Error to the Court of Appeals of the District of Columbia.

Brief and Argument in Support of Petition for Writ of Certiorari.

I. TRIAL COURT HAD NO JURISDICTION.

(1) Section 841 Does Not Apply to This Case.

This prosecution is based exclusively upon the intensely penal section 841 of the code of law of the District of Columbia. The code is composed chiefly of old laws carried forward, but this section is entirely new, original, exclusive and the first legislation on the subject of embezzlement by fiduciaries ever passed or in force in this District.

Section 841 appears under the title "Offenses against Property," and contains in and of itself, and without any reference *aliunde, and as a condition precedent to its operation,* a complete, specific and particular description of the classes of persons and property and possession that it includes and requires, and a like description of the character of the property of the class to which it applies. The pertinent parts are as follows (R. 76):

> "Any * * * receiver * * * *into* whose possession money * * * of any other person *may come* by virtue of his office or employment, who *shall* fraudulently convert or appropriate the same to his own use, *shall* forfeit all right or claim to any commissions, costs, and charges thereon, and *shall* be deemed guilty of embezzlement of the entire amount or value of the money or other property so *coming* into his possession and converted or appropriated to his own use, and *shall* be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

The trial court was absolutely without jurisdiction of this case, because the statute is purely prospective, and includes only persons and property that *"may come"* into possession in the future—*"coming"* property—while this prosecution relates only to persons and property that *had come* into possession in the past—six years before the statute was enacted and seven years before it took effect. The law is strictly limited to "any * * * receiver * * * into whose possession money * * * *may come* * * * who shall fraudulently convert * * * the money * * * *coming* into his possession."

The judges below simply usurped jurisdiction by interpolating into the statute words of retrospective effect, so as to make it meet the exigencies of this case, which otherwise it concededly cannot do.

In *Eddy* v. *Morgan*, 216 Ill. 437, the court said (p. 447):

> "In the construction of statutes it is the duty of the court to take the words found in the statutes and to give to each its ordinary, usual meaning. We are not permitted to qualify words there found by introducing other words which would change the effect of the act, to make it comport more nearly with what we think it ought to be. As was said by *Mr. Justice Tindall*: 'It is the duty of courts to confine themselves to the words of the legislature, nothing adding thereto, nothing diminishing. We must not import into an act a condition or qualification which we do not find there.'"

The trial judge read into the act the words *"may be"* for *"may come,"* and the appellate judge (R. 78) interpolated the phrase

"may have passed." Both proceeded solely upon the theory (R. 77-78) that there was *no reason* for Congress to make a distinction between the past and future, and that the exclusively prospective language of the section was used inadvertently and unintentionally, while Congress meant to provide for the past.

The trial judge said:

> "To construe a statute is to do no more than come at the intent to be expressed by the legislature through the use of words. Sometimes there could not have been any reason for a particular intention. Therefore it comes to be determined whether or not these words '*may come*' were intended by Congress to convey their technical, literal, grammatical significance, or whether they were used as synonyms for some other word or set of words. In the first place, there is *no reason* for any legislation which would carry with it the distinction which counsel for the defendant claim is carried by these words. * * * There is no retroactive force attributable to this statute by giving these words '*may come*' the significance of the words '*may be.*' * * * It was as much the intention of Congress by this section to reach the cases of receivers already appointed and who were already in possession of property, as it was to reach the cases of receivers who may be appointed to-morrow and who may come into possession of property to-morrow. I remember one case wherein a question analogous to this was decided, *M. & L. Ry. Co.* vs. *Herrick,* 13 Bush. 122, in which was construed a statute reading: 'A married woman who shall come to this Commonwealth without her husband, he residing elsewhere, may acquire property, contract, and bring and defend actions as an unmarried woman,' etc. The court said: 'To exclude her because the statute speaks only of married women 'who shall come,' etc., would be to adhere to the letter of the law and to disregard the spirit. It was intended as an enabling act for the benefit of a class of persons laboring under legal disabilities, and not enjoying the protection incident to the state of marriage, because of the absence from the Commonwealth of their husbands; and a person clearly within this class will not be denied the benefit of a remedial statute by grammatical construction.' "

Endlich on Interpretation of Statutes says (section 329) that a penal statute must expressly apply to the particular case, in order to include it. In ascertaining its meaning "the court cannot go beyound the plain meaning of the words and phraseology employed, in search of an intention not certainly implied in them; in other words, whilst a case may come within the purview of a remedial statute unless its language, properly construed, excludes it, it is excluded from the reach of a criminal statute unless the language includes it; unless the proper meaning of the language of the statute brings a case within its letter the rule of strict construction forbids the court to create a crime or penalty by construction, and requires it to avoid the same by construction; and, although the court may be unable to conceive any reason why the case in question should have been omitted, and considers it highly improbable that an omission was intended, it is not at liberty to extend the enactment to cases not included within the clear and obvious import of the language."

The language just quoted was approved in *Todd* v. *U. S.*, 158 U. S. 278, 282, and in *Ex p. Bailey*, 39 Fla. 734, 743.

It is unquestionable that when the legislature intends the infliction of punishment, it will not leave its intention to be gathered by mere doubtful inference, or convey it in cloudy or dark words only, but will manifest it with reasonable clearness; for an offense cannot be created or inferred by vague implications. *End. Inter. St.* Sec. 329.

> "A penal law must be construed strictly, and according to its letter. * * * The purpose of the rule is to prevent acts from being brought within the scope of punishment, because courts may suppose they fall within the spirit of the law, though not within its terms." *Com.* vs. *Cooke*, 50 Pa. St. 201, 207.
>
> "Acts of this kind are not to be regarded as including anything which is not within their letter as well as their spirit (*Dewey* vs. *Goodenough*, 56 Barb. 54, 57) and which is not clearly and intelligently described in the very words of the statute, as well as manifestly intended by the legislature." *Wilb.* 246.

In *Amy* v. *Watertown No. 2*, 130 U. S. 320, the court said (p. 324):

"The general rule is that the language of the act must prevail, and no reason based on apparent inconvenience or hardship can justify a departure from it, * * * for otherwise the court would make the law instead of administering it."

In *U. S.* v. *American Sugar Co.*, 202 U. S. 563, the question was whether the act of Congress of Dec. 17, 1903, relating to the Cuban Treaty, operated to make the treaty retrospective so as to include in a provision for tariff reduction certain sugars imported into the United States between the dates when the treaty was made and when it took effect. With one exception (*"are now"*) the act was expressed in the simple future tense (p. 578, *"shall continue,"—"shall remain,"—"shall receive,"—"shall be admitted"*). The court answered in the negative, and unanimously said (pp. 577-578, 579):

"It was certainly competent for Congress (with the consent of Cuba) to have given the treaty retrospective, immediate, or prospective operation. Which did Congress do? And in reply we are to remember there is a presumption against retrospective operation, and we have said that words in a statute ought not to have such operation 'unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' *United States* v. *Burr*, 159 U. S. 78, 82.

"Turning to the act of December 17, we find it expressed in the simple future tense, and this must be given weight. *United States* v. *Goldenberg*, 168 U. S. 95, 102. So far as the text of the act itself is concerned, all of its parts accord; all of its provisions are prospective but one. * * * The words of the act, therefore, refer manifestly to an event to occur. * * * We cannot suppose that, if Congress intended to give retrospective operation to the act, it would have used the words that expressed the contrary. The day at which the treaty should operate * * * was of easy expression. Future time and past time are directly opposite, and by no inadvertence or intention can we believe or suppose that Congress, having in mind and purpose the distinction between the past and the future, should use language that expressed the one while it meant to provide for the other."

In section 841, did Congress use the terms, *"may come,"* and *"shall,"* and *"so coming into his possession,"* to refer to events that had already occurred? Did it inadvertently or unintentionally use the language that expresses only the future while it meant to provide for its antipode, the past? Can a court construe this language to include past events? Can a judge interpolate the retrospective language which Congress omitted? Can a court consider the object designed to be reached, or the mischief sought to be suppressed, or any other matter *dehors* the statute, where it is clear upon its face, and when standing alone it is fairly susceptible of but one construction? Can a judge re-edit a statute because he can conceive no *reason* why Congress should make a distinction between the future and the past?

The appellate judge said (R. 77, 78):

> "The fact which may be inferred from the indictment is made certain by the evidence, namely, that the money came into the possession of the receivers prior to the enactment of the Code. * * *
>
> "Words like *may*, must, *shall*, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed. * * * It is inconceivable that Congress intended to make a distinction in respect of property * * * dependent upon the time when the same shall have come into * * * possession * * *. There is no possible foundation in law or morals for such a distinction, and unless compelled by an unmistakable expression of such an intention, no court would be justified in adopting a construction that would give it recognition. * * *
>
> "We are of the opinion that the learned trial justice did not err in holding that Sec. 841 comprehends property that *may have passed* into the defendant's possession as receiver before the time that it went into effect."

In *Martin* v. *Martin*, 27 App. D. C. 59 (Feb. 6, 1906, *per* Shepard, Ch. J.), the court, in holding (p. 62) "that where a statute requires an oath to be made by a party * * * it is not satisfied by the affidavit of his attorney or agent," said (p. 62):

"The intent of the lawmakers is to be found in the plain language of their enactment. Considerations of inconvenience and hardship * * * may well operate upon the makers of the law, but cannot justify a judicial addition to the letter of the statute. *Ohio Nat. Bank* v. *Berlin*, 26 App. D. C. 218, and cases cited."

In *Todd* v. *U. S.*, 158 U. S. 278, this court said (p. 282):

"It is axiomatic that statutes creating and defining crimes cannot be extended by intendment, and that no act, however wrongful, can be punished under such a statute unless clearly within its terms. There can be no constructive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute."

The same language was used in *U. S.* v. *Brewer*, 139 U. S. 278, 288, and in *Lacher* v. *U. S.*, 134 U. S. 624, 628, 629.

In *Ex p. Bailey*, 39 Fla. 734, the court said (p. 743):

"The established rule is that a penal law must be construed strictly and according to its letter. Nothing is to be regarded as included within them that is not within their letter as well as their spirit; nothing that is not clearly and intelligently described in the very words of the statute as well as manifestly intended by the legislature. And where a statute of this kind contains such an ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of life or liberty is to be preferred."

In *U. S.* v. *Potter*, 56 Fed. 83, the court said (p. 88) that the effect of the Sixth Amendment begins—

"with the statutes fixing or declaring offenses, and, as to them, insures the general rule of the common law that they are not to be construed to embrace offenses which are not within their intention and terms. * * * They must be in some way declared by the legislative power, and cannot be constructed by the courts from any supposed intention of the legislature which the statute fails to state."

In *St. Paul Ry. Co.* v. *Phelps*, 137 U. S. 528, this court said (p. 536):

> "Where a statute, as in this case, is clear and free from all ambiguity, we think the letter of it is not to be disregarded in favor of a mere presumption as to what is termed the policy of the government, even though it may be the settled practice of the department."

In *Thornly* v. *U. S.*, 113 U. S. 310, this court said (p 313):

> "Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such a case there is no necessity for construction."

The embezzlement statutes are to be strictly construed, and no one can be punished under them, however grievous his wrong, who is not fairly comprehended *within the precise language. It is not enough that he may come within the spirit and intent.* 10 *Ency. Law* 997.

In *State* v. *Meyers*, 56 Ohio St. 340 (1897, 6 judges, no dissent), the court construed an embezzlement section of the code which provided that "whoever being charged with the collection, receipt, safekeeping, transfer or disbursement of the public money or any part thereof," converts the same to his own use, or to the use of another, shall be guilty of embezzlement. The accused was the deputy county treasurer, but, at the time of his alleged embezzlement, he was acting as the county treasurer under appointment of the latter by authority of a statute. It was held on demurrer to the indictment that the law applied only to persons "who are charged by law with the performance of the duties or some of them therein mentioned," and as the accused was not so charged by law, but by the treasurer, he was not within the statute because not within its descriptive terms. The court said (pp. 349, 350):

> "But the language of section 6841, 'whoever being charged with the collection,' etc., of the public money, is descriptive of the persons who may be guilty of the offense it punishes and is therefore descriptive of the offense; and, under that fundamental rule of strict construction applicable to all penal laws, a statute defin-

> ing a crime can not be extended by construction to persons or things not within its descriptive terms, though they may appear to be within the reason and spirit of the statute. Persons cannot be made subject to such statute by implication. Only those transactions are included in them which are within both their spirit and letter; and all doubts in the interpretation of such statutes are to be resolved in favor of the accused. *Bishop on Statutory Crimes,* section 194. As said by *Chief Justice Marshall,* in the case of the *United States* vs. *Wiltberger,* 5 Wheat., 76-96: 'To determine that a case is within the intention of a statute, its language must authorize us to say so,' " etc.

To the same effect are the embezzlement cases of *People* v. *Shearer,* 143 Cal. 66, 67 (county physician) and *State* v. *Hubbard,* 58 Kan. 797, 799 (receiver), each holding that the accused was not liable because not within the strict letter of the law.

In *U. S.* vs.. *Long,* 10 Fed. 879, 880, an indictment against a postal employee for embezzlement, the court said:

> "By no grammatical construction, nor by any reasonable intendment, can this section be made to cover the offense of embezzling a letter with valuable contents, such as is charged in this indictment."

In *State* v. *Connelly,* 104 N. C. 794, the court said (pp. 797, 799):

> "If the legislature intended to embrace such public officers [clerks of superior courts, in embezzlement statute] generally, it would, most likely, have done so in plain, direct terms, not leaving its purpose to conjecture and inference. Statutory criminal offenses are not created simply by implication. The purpose to create them must appear, in terms or by necessary implication, clearly to be seen. * * * This may be a serious mistake, but it is not the province of courts to devise further methods and means for suppressing such mischiefs [embezzlements]. They must, and can only, apply the law as they find it prescribed by the legislature."

In *France* v. *U. S.,* 164 U. S. 676, the accused were convicted by the judicial enlargement of the federal statute to suppress lotteries. This court unanimously said (pp. 682, 683):

> "The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. Full effect is given to the statute by holding that the language applies only to that kind of paper which depends upon a lottery the drawing of which has not taken place, and which paper purported to be a certificate, etc., as described in the act. If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation."

This section 841 is highly penal and must be strictly construed. Its language is plain, and cannot be extended by implication or construction to include persons or property or acts not clearly and unmistakably within its terms. It has no retroactive effect; but, by its very words, and the universal rule of construction, and the express provisions of the code itself, it applies only to receivers whose possession was acquired after, not before, the code, and only to property the possession of which was acquired after, not before, the code, and only to conversion occurring after, not before, the code. Construed retrospectively, the forfeiture clause is unconstitutional and void, and operates a nullification of the whole section.

This section defines (1) the fiduciaries included, expressly prescribing that it shall apply only to those into whose possession property *may come* after the code takes effect; (2) the property made the subject of embezzlement, expressly restricting it to that property which *may come—"coming"*—into possession after the code takes effect; (3) the ultimate act constituting the offense, but only in general terms and by way of conclusion; (4) the forfeiture, but only in general terms, and without prescribing that it shall include vested rights or claims to costs, charges and commissions; (5) the name of the offense composed of all the constituent elements combined; (6) the maximum fine; (7) the maximum imprisonment; and (8) that both fine and imprisonment may be imposed.

The section is expressly future as to (1) the persons, (2) the property, (3) the possession, (4) the ultimate act, (5) the forfeiture,

(6) the offense, (7) the fine, and (8) the imprisonment. It is indefinite only as to the time of the fiduciary's appointment.

The indictment (R. 1-2) alleges the defendants' appointment as receivers on November 6, 1894, and charges by implication (R. 77) that the money had come into their possession before the code took effect. The evidence fixed the exact date as June 28, 1895 (R. 37). It is essential that the indictment and proof distinctly show that the money came into their possession after, not before, the code became effective, in order to bring them within the enactment.

Rightful possession by virtue of the office or employment of the accused is indispensable, and section 841 specifically describes the character of the possession required as a condition precedent to its operation—a possession which must arise or accrue after the law takes effect, and no other. *It does not act on a possession acquired before the statute was passed.* It is fully satisfied in every part, both as to letter and spirit, by holding that the language applies only to persons and property *coming* or that *may come* into possession in the future—after it has taken effect. The judges below refused so to hold, for the reasons stated by them.

> "And, oftentimes, excusing of a fault
> Doth make the fault the worse by the excuse."

What more "unmistakable expression" of an intention to make a distinction between the past and the future can possibly be found than in the words of section 841? Does the appellate judge require Congress to say in terms, "We hereby intend to distinguish between the past and the future?" Or what is the "unmistakable expression" that he recognizes as such? Is it dependent upon the whim or caprice or prejudice of every judge in every case, and no longer upon the language of the law?

In *Green* v. *U. S.*, 25 App. D. C. 549, the court construed section 838 of the code against embezzlement by warehousemen, commission merchants, etc., and said (p. 551):

> "We take it that this section is to be so construed that the fair and ordinary meaning be given to its terms. We think they are clear and unambiguous."

There is not the slightest doubt or ambiguity about the terms of section 841, and *the judges below have neither pointed out nor sug-*

gested nor even insinuated that there is, if given their fair and ordinary meaning; but by alleged construction, they have added to it a class of persons and property and possession that the law itself wholly excludes, in order to make it fit this case.

Since section 841 has now been in force about five years, and this is the first and only case under it, it is exceedingly improbable that any other ever will arise which will present the point made against the application of the statute in this case. Any future cases will undoubtedly be those in which the persons and property have come into possession since the law took effect on January 1, 1902. The temptation to stretch the law is therefore now removed.

(2) Prospective Effect of May, Come, Into, and Coming, in Section 841.

We have argued and argued in vain in the courts below that this highly penal statute is purely prospective and means just what it plainly says, and no more; that *"may come"* means *"may come;"* that *"coming"* means *"coming;"* that *"shall"* means *"shall;"* and that *"into"* means *into;"* but the judges below have simply held (R. 77-78) that Congress did not intend what it plainly said, that it did not know the sense of its own words, or the rules of grammar, or its own mind or meaning, but that by the terms it used it intended to express the meaning of their antipodes. That the terms used refer only to future events is illustrated by the following:

In *Green* v. *Robinson,* 41 Conn. 470, the court said (p. 471):

> "The result of the question entirely depends on the proper construction of a single clause in the plaintiff's agreement. The promise of the plaintiff is to credit on the defendant's notes any amount he *may receive* from Souls & Co. over and above four hundred and eighty dollars. It seems very clear that the words '*may receive,*' in the connection in which they are used, apply only to the five hundred and forty dollars subsequently received and have no reference to the three hundred and sixty dollars which had previously been paid. The grammatical construction of the language is too obvious to be reasonably questioned, and its ordinary and common sense import appear equally certain."

In *Shoemaker* v. *Smith,* 37 Ind. 122, the court said (p. 128):

> "The several counties are to be held liable for the preservation of so much of the fund as '*may be intrusted*' to them, and for the payment of the annual interest thereon. The language employed cannot have reference to the fund that had already been intrusted to the counties, because it speaks for the future and not for the past. It contemplates a future intrusting of the fund, or some part of it, to the several counties. The words '*may be*' are peculiarly appropriate to express the future and not the past."

In *Johnson* v. *Mon. Nav. Co.*, 32 Pa. St. 153, the court said (p. 156):

> "What then is to be the extent of its operation? Certainly not retrospectively, unless the provisions of the act cannot be sustained otherwise. But to assert this would be idle indeed. Past liability is not touched by the clause. * * * The 'company shall not hereafter be liable for damages which *may be done*' is certainly not the same thing as if it had been said that the company shall not hereafter be liable for damages which *may have been done*. Yet this is the construction contended for. It is neither philologically, nor in common parlance, correct to give to the words referred to, standing in the position they do, a past signification. They are in their connection distinctly future."

In *Durfee* v. *Plaisted*, 38 Cal. 80, 84, the court construed the act of Congress of March 3, 1885, and said:

> "There is no room for doubt that the lands referred to by the language, 'or which *may be designated* for such purposes by the President,' were lands that might thereafter be designated for public purposes by the President."

In Pitkin v. *Aspen*, 3 Colo. App. 223, 227, the court, in construing a statute in which was used the phrase *"may be liable,"* said:

> "The words '*may be*' can only be construed as meaning the future."

In *South Carolina* v. *Gaillard*, 101 U. S. 433, 438, the court construed a statute which referred to certain suits which *"may be in-*

stituted;" and held that this form of expression excluded the idea that such suits had already been instituted. The court said:

> "The tender and deposit of the bills laid the foundation for the authorized proceeding, but did not institute it. This is clear from the language. The bills are to be deposited 'to abide the decision of the court in any proceeding which *may be* instituted,' thus implying that when the deposit was made proceedings had not been instituted."

Section 30, act of April 12, 1902, 32 Stat. L. 97, 98, reads:

> "Shall be due and payable * * * and shall be a lien and charge upon the property of every person who *may die,*" etc.

In re Hotchkiss, L. R. 8 Eq. 643, 649, it was held that a gift to children of the members of a class "who *may die* in my lifetime," did not include the children of a member of such class who was dead at the date of the will.

In *Sanders* v. *O'Callaghan,* 111 Iowa 574, 581, *"may continue"* was held to be purely prospective.

In *Herbert* v. *Gray,* 38 Md. 529, 531, the court held the following statute not to be retrospective, and not to apply to joint notes made prior to its enactment, but only to those made after it took effect from the date of its passage:

> "Any married woman *may be sued* jointly with her husband * * * on any note * * * which she *may have executed* jointly with her husband, and *may employ* counsel and defend such action, separately or jointly with her husband, and judgments recovered in such cases *shall* be liens on the property of the defendants, and *may be collected* by execution or attachment in the same manner as if the defendants were not husband and wife."

The phrase, *"may have executed,"* was held (p. 533) to refer to the time of instituting the suit, and not to the time of the passing of the act, and not necessarily to embrace notes which had been executed before the law was enacted; and therefore prospective construction alone was permissible.

Sec. 3143 R. S. U. S. reads:

"Every collector * * * shall execute a bond for such amount as may be prescribed by the Commissioner * * * conditioned that said collector * * * shall justly and faithfully account for and pay over * * * all public moneys which *may come* into his hands or possession; * * * and he shall from time to time renew * * * his bond, as the Secretary * * * may direct, with such further conditions as the said Commissioner shall prescribe; and he shall execute a new bond whenever required * * * with such conditions as may be required by law or prescribed by the Commissioner," etc.

Sec. 3164 R. S. U. S. reads:

"It shall be the duty of every collector of internal revenue to report within ten days to the district attorney * * * a statement of all the facts and circumstances of the case within his knowledge * * * and which *may come* to his knowledge from time to time," etc.

Is it conceivable that the phrase *"may come"* was used in either of these sections to refer to a past event—in the sense of "may have come" or "might have come?" Is it any more conceivable that it was used in section 841 in a past sense? Under section 3143 R. S. and the condition of the bond prescribed, would the sureties be liable for all public moneys which had come into the collector's hands or possession before that law was passed or the bond was executed? In section 3164 R. S. the future meaning of *"may come"* is sharply brought out—"the facts and circumstances of the case within his knowledge * * * and which *may come* to his knowledge *from time to time.*" Surely, *"may come"* and *"so coming into his possession,"* in section 841, refer to a future event only, *as a condition precedent to the operation of the statute.* Any other construction defies both the law and the language, and sets the will of the court above that of Congress.

In re Birdsall's Estate, 49 N. Y. Supp. 450, the act read (p. 462):

"Such tax shall also be imposed when any person or corporation *becomes* beneficially entitled, in possession or expectancy, to any property or the income thereof, by any such transfer, whether made before or after the passage of this act."

The court said (p. 463):

> "The act speaks from the time it takes effect, and seems to us very clear and plain that the vesting of the beneficial interest in possession or expectancy, which is the condition precedent to the right to tax, is a future event—an event occurring after the passage of the act, and cannot be held to apply to a beneficial interest already vested in possession or expectancy. This doctrine is clearly recognized in the *Seaman Case*, 147 N. Y. 69. Then again, the verbs, 'shall' and '*become*' and the adverb 'when,' as they are employed in the act, clearly refer to future and not to past, events."

In *Bear* v. *Atlanta Ins. Co.*, 70 N. Y. Supp. 581, the court said (p. 583):

> "The condition of the policy with reference to the building '*becoming*' vacant or unoccupied has reference to the future. It relates to a change in the condition of the property in this respect after the insurance is affected, and not to a condition existing at the date of the policy."

In *People* v. *Cook*, 96 Mich. 368, the statute (p. 370), making the offense a felony, punished every person "who shall solicit * * * a female to enter such a house for the purpose of * * * *becoming* a prostitute." The court held that "*becoming*" referred to a future event, and said (p. 373):

> "Some force must be given to the word '*become*;'" and it is evident that the Legislature did not intend to make the offense complete by the mere soliciting of a female who is already a prostitute, and in a house of ill-fame, to go from that place into another house of like character."

"*To become due*" refers only to the future. *Foster* v. *Singer*, 69 Wis. 392, 394. *Martin* v. *Campbell*, 120 Mass. 126, 130. "*Become due and payable*" is prospective only. *Sibley* v. *Cook*, 3 Atk. 572, 573.

In *State* v. *Mannix*, 9 Ohio Decisions (Reprint) 667, the court said (pp. 667, 668, 670):

> "The statute under which the defendant was indicted was passed on the 17th of April, 1885, and took

effect from and after its passage, and the language of the statute, so far as it applies to this case is as follows:

"'An * * * assignee in insolvency * * * who embezzles or converts to his own use * * * anything of value which *shall come* into his possession by virtue of his employment or appointment as such * * * assignee in insolvency is guilty of embezzlement, and shall be punished' * * * .

" * * * This law only came into existence on the 17th of April, 1885, so that such an assignee in insolvency can only be amenable to the provisions of this law for money which came into his possession as such assignee *after* the passage of the law on the 17th of April, 1885."

The court further said that it was necessary that it should appear beyond reasonable doubt "that *after* the passage of the act 17th April, 1885, referred to, and while continuing as such assignee, the money * * * charged in the indictment, and enumerated in the bill of particulars, came into his possession by virtue of his employment or appointment as such assignee."

The *Mannix* case was a *cause celebre* in its day. The defendant was the assignee of Bishop Purcell, and received about $350,000 under the assignment. He admitted that he had lost $183,000 of this money in Wall street speculation. He kept no books, and destroyed all of his papers relating to his receipts and disbursements. (See 16 *Ohio Weekly Law Bulletin* 197, 212, of September 20, 1886.) At that time there was no law in Ohio against embezzlement by assignees; but the Mannix case was so irritating that on April 17, 1885, an act was passed, chiefly to reach Mannix, and he was immediately indicted under it, but was not convicted, principally because the law applied only to property *"which shall come into his possession,"* and it could not be shown that any of the money which it was alleged Mannix, had embezzled, had come into his possession *"after the passage of the law."* The court simply followed the act, and did not attempt to extend it. Even the State did not deny that the law would not reach the embezzlement of pre-acquired money.

This is the only case that we cited below which the appellate judge (R. 78) admits "covers the particular phase of statutory construction here presented;" and he adds (R. 78) that this excepted

case "is the decision of an inferior court of another jurisdiction, unofficially reported." No attempt is made to show that it announces bad law or grammar. The official report is given above. The decision simply declares the elementary and necessary effect of *"shall come into his possession."* Either it is exactly right or the following decision of its critic is hopelessly wrong:

In *Bank* v. *Berlin*, 26 App. D. C. 218 (Nov. 8, 1905, *per* Shepard, Ch. J.), the question was whether the remedial section 1214 of the D. C. code, concerning the liens of judgments and decrees which *"shall be rendered,"* included a judgment for $426 rendered May 13, 1901—between the dates when the code was passed and when it took effect ten months later. The court answered in the negative. The judge quotes liberally (p. 222) *Lake Co.* v. *Rollins*, 130 U. S. 662, 670, and from (p. 222-223) *Denn* v. *Reid*, 10 Peters 524, 527, and from (p. 223) *U. S.* v. *Goldenberg*, 168 U. S. 95, 102, to show that because there was *no reason* for Congress to make a distinction between existing and future judgments and decrees, gives no warrant or excuse whatever to the court to read retrospective words into the statute in order to make it include the former, and says (pp. 221, 222):

> "The question remaining then is whether the lien operates from and after the passage of the Code in favor of all judgments then in existence as well as in favor of those thereafter rendered? The literal meaning of the words 'from the date when the same *shall be rendered*' limits the lien to future judgments. To hold that they give a lien to final judgments from the date of the enactment is contrary to the grammatical construction and the plain, natural import of the words. There is no other language in the section warranting an inference that those words were intended to have any other than their literal and natural meaning.
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> * * * * * * * * * * *
>
> "Practically the only ground upon which the argument for going beyond the letter of the statute rests is the want of any apparent reason why the legislature should have made a distinction between future judgments and existing ones. Undoubtedly, the lien given by the statute might wisely and justly have been extended to both classes of judgments, but the courts have no power to interpolate words necessary to ac-

complish that end. They have nothing to do with the motive actuating the legislature."

In the later case at bar, the same judge, referring to the intensely penal statute involved, said (Record pp. 77, 78, 27 App. D. C. 433, 440, May 1, 1906):

> "Words like *may*, must, *shall*, and so forth, are constantly used in statutes without intending that they shall be taken literally, and in their construction the object evidently designed to be reached limits and controls the literal import of the terms and phrases employed. * * * It is inconceivable that Congress intended to make a distinction in respect of property * * * dependent upon the time when the same shall have come into * * * possession * * * *. There is no possible foundation in law or morals for such a distinction, and * * * no court would be justified in adopting a construction that would give it recognition."

The judge is most significantly silent as to his own flatly contrary but correct opinion in the *Berlin* case, and also as to the unanswerable authorities therein quoted by himself, as well as to the others herein cited. The reason for his silence is very obvious.

We here repeat part of the language used in declaring the meaning and effect of *"shall"* in a statute, already quoted from *U. S.* v. *Am. Sugar Co.*, 202 U.S. 563, 579:

> **"FUTURE TIME AND PAST TIME ARE DIRECTLY OPPOSITE, AND BY NO INADVERTENCE OR INTENTION CAN WE BELIEVE OR SUPPOSE THAT CONGRESS, HAVING IN MIND THE PURPOSE AND DISTINCTION BETWEEN THE PAST AND THE FUTURE, SHOULD USE LANGUAGE THAT EXPRESSED THE ONE WHILE IT MEANT TO PROVIDE FOR THE OTHER."**

In *Sarlls* v. *U. S.*, 152 U. S. 570, the accused was convicted by the judicial extension of the words "spiritous liquor or wine," used in the statute, to include lager beer. This court unanimously said (pp. 572, 574, 575, 577):

> "To enable us to solve the question we must look to the popular signification of the terms used. * * *

> The reasoning on which such a conclusion is reached excludes the common and popular signification of the words, and finds the meaning of the statute in the fact • • • that the purpose of the statute is to prevent the mischief occasioned by the use of intoxicating drinks.
>
> "We cannot agree with this method of reading a penal statute. The purpose of such a statute is to notify the public of the legislative intent. • • • That intent is • • • to be found by giving to the words the meaning in which they are used in ordinary speech.
>
> "Nor can courts, in construing penal statutes, safely disregard the popular signification of the terms employed, in order to bring acts, otherwise lawful, within the effect of such statutes, because of a supposed policy or purpose. The danger of substituting for the meaning of a penal statute, according to the popular and received sense, the conjecture of judges as to a supposed mischief to be corrected, is pointed out by *Chief Justice Marshall*, when, in the case of *United States v. Wiltberger*, 5 Wheat. 76, 96, he said: • • • The temptation to stretch the law to an acknowledged evil is now removed."

U. S. v. *Harris*, 177 U. S. 305, was an action against railway receivers to recover a penalty for a violation of the federal statute against cruelty to animals in transit. The Government in vain cited other statutes and cogent reasons why the word "*company*" should be extended to include receivers. The court unanimously said (p. 308):

> "It may be conceded that it was the intention of Congress to subject receivers of railroad companies, appointed such by courts of the United States, to the valid laws and regulations of the States and of the United States • • • . But we are not now concerned with the general intention of Congress, but with its special intention, manifested in the enactments. • • • Can we fairly bring receivers within the penal clause by reasoning from a supposed or an apparent motive in Congress in passing the act? • • •
>
> "It must be admitted that, in order to hold the receivers, they must be regarded as included in the word 'company'. Only by a strained and artificial construction, based chiefly upon a consideration of

the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? * * * The intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

The same principles are laid down at some length, and applied in *Johnson* v. *Ry. Co.*, 117 Fed. Rep. 462, 465-469 (C. C. A.), in construing a penal statute relating to railway companies.

In *Dean* v. *Reid*, 10 Peters 524, this court said (p. 527):

"This, it must be admitted, when we consider the mischief the law was probably intended to remedy, is a somewhat technical construction of the act; and cases may be found where courts have construed a statute most liberally to effectuate the remedy; but where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature. Where the language of the act is not clear, and is of doubtful construction, a court may well look at every part of the statute, at its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions.

"We are unable to say why the benefits of this statute were given to those who held under deeds proved by the subscribing witnesses, and withheld from those whose deeds were proved by the acknowledgement of the grantor. In most cases, if not in all, proof by acknowledgement would be deemed more satisfactory than by witnesses; but the Legislature having made a distinction between the cases—whether it was intentional or not, reasonable or unreasonable—the court

are bound by the clearly expressed language of the act."

In *U. S.* v. *Goldenberg*, 168 U. S. 95, this court said (p. 102):

> "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation. • • • No mere omission, no mere failure to provide for contingencies, which it may seem wise to have provided for, justify any judicial addition to the language of the statute."

These words are used in holding that *"shall • • • give notice"* and *"shall pay"*, in a revenue act, refer exclusively to future events, and the case was approved in *U. S.* v. *Am. Sugar Co.*, 202 U. S. 563, 578.

In *Lake County* v. *Rollins*, 130 U. S. 662, this court said (p. 670):

> "To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

Section 841 is only to take effect ten months in the future. It is purely prospective in all of its provisions. *A possession of property to be acquired by a fiduciary after it has taken effect is an express condition precedent to its operation.* Its language cannot include, but certainly excludes, persons and property that had come into possession before its enactment. *"Into"* can never be used with a verb denoting inaction or rest, but only with one indicating action or motion. *"Come"* denotes motion, not rest. *"May"* here expresses the simple future with the element of doubt or condition, often put in the form of *"shall"* with *"if"*. The phrase, *"into whose possession*

*money * * * may come*", necessarily means a possession of money to be acquired in the future. This is made certain by "*coming*," which is here equivalent to and is often used for the infinitive in a purely future sense; and also by the invalidating effect of the forfeiture clause when construed retrospectively; and also by the destructive *ex post facto* effect of the phrase, "*converted or appropriated to his own use*," when read retrospectively instead of prospectively and elliptically. Giving to the words of the act their fair and usual meaning, the law is perfectly plain in every part, and can have no possible application to this case.

So far as words go, there is far more excuse for reading "*converted or appropriated to his own use*" as referring to a past act, than for reading "*may come*" and "*coming*" and "*shall*" as referring to past events; but such readings are foolish, because the terms used refer strictly and only to the future. We simply want the statute read as it reads, and not re-edited as it has been by the judges below.

Suppose that section 1214, construed in *Bank* v. *Berlin*, *supra*, had read, "from the date when the same *may be rendered*,' or "from the date when the court *may render* the same" or "from the date when the same *may come into existence*," etc. Would the decision of the Court of Appeals have been the reverse of what it was? Evidently not, unless the act were highly penal, and the judgment against the accused.

Is it not very certain that if section 841 had been a purely remedial statute, and if the instant case had involved only a money judgment for a few dollars, the Court of Appeals in its opinion would have construed the statute strictly and literally, and (in its own language), according to "*the grammatical construction and the plain, natural import of the words*"? And so construed, is it not certain that it would have held it not to include, but to exclude, persons and property that had come into possession before the law was passed? And not to include the forfeiture of vested rights or claims to commissions, costs and charges? And not to be subject to retrospective construction in any respect? Yet it has been well said that "*there is more in human liberty than in any other question which concerns mankind*," —but not by the judges below.

In *Market Co.* v. *Hoffman*, 101 U. S, 112, the court said (p. 115):

> "It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as *Bacon's Abridgment*, section 2, it was said that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant."

Whether taken as a whole, or critically analyzed, the language of section 841 and its grammatical construction prove our contention to be sound.

"May" denotes contingency or liability, probability or possibility, doubt or consequence, or condition in a future sense. *Webster's Dictionary.*

The auxiliary verb *"may"* is "prefixed to one of the principal parts of another verb, to express some particular mode and time of the being, action, or passion." It has but "two forms ['*may*' and '*might*'] in respect to tense or time. * * * It is used also, to express doubt, or a consequence, with a future signification; as, 'I *may* recover the use of my limbs, but I see little probability of it.'—'That they *may* receive me into their houses.' *Luke*, XVI, 4. *Churchill's Gram.*, p. 274. In these * * * instances, the potential present is akin to the subjunctive." *Goold Brown's Grammar of English Grammars*, pp. 361, 363, 364.

Greene says:

> "The auxiliary verbs are used to form the modes and tenses of other verbs, and to give to the forms in which they are used the shades of meaning peculiar to their original signification. * * * The auxiliary verbs should be regarded merely as relation words, or words used to show relation of time and mode." *Greene's Analysis*, p. 67.

"Come" denotes motion, and means to move hitherward; to draw near; to approach some person or place indicated. *Webster.* To happen; to approach; to move toward. *March's Thesaurus Dictionary* (see full note p. 180, and elaborate collection under title "Future-Past" pp. 435-436, including *coming, come on, time to come, to come*, etc.).

"Into" denotes motion, and means entrance or passage inwards; the passing from one state or form to another; it comes only after

a verb indicating motion, while *"in"* follows one denoting rest. 16 *Col. Cyc. Webster. March's Thesaurus Dict.* p. 555.

When we speak of property that *may come* into our possession, we necessarily mean property that may move out of the possession of another into that of ourselves at some time in the future. The phrase *"may come into possession,"* or *"into whose possession money * * * may come,"* cannot possibly apply to property already in our possession and therefore at rest, for it requires future motion—the very antipode of rest.

"Coming," in its adjective sense, denotes motion, and means approaching; of the future; especially the near future; the next; as, the coming week or year; the coming exhibition. *Webster.* Approaching. *March's Thesaurus Dict.* p. 181. In its participial sense, *"coming"* is equivalent to the infinitive *"to come,"* and either form may be correctly used, as one pleases. *Brown Gr. of Eng. Gr.* p. 637. *"Property so coming into his possession"* is synonymous with *"property so to come into his possession."*

By *"coming"* property, Congress could not possibly have meant property that had come into possession. It was of easy expression to include persons and property that had come into possession before the law, and to make the act retrospective; but in such event Congress would certainly have made proper provision for commissions, costs and charges which had been previously earned and allowed. Full effect can be given to the statute, as we have said, by applying it only to persons and property that *"may come"* into possession in the future, and it is neither necessary nor permissible for the courts to read into it words of retrospective meaning, as has been done in this case, so as to force it to include those that had come into possession in the past.

"May come" and *"might have come"* are antipodes as to time, and mark the broad distinction between the future and the past, and between property or possession to be acquired in the future, and that acquired in the past. A person into whose possession property had come before the law cannot by any torturing of language be included in a highly penal statute directed solely against a class of persons into whose possession property *"may come,"* who shall convert the property so *"coming"* into their possession. *Courts must take Congress at its word.*

There certainly is no necessary or inexorable reason why Con-

gress should have included in section 841 those fiduciaries into whose possession property had come or may or might have come before the law was passed or took effect, in addition to those into whose possession property *"may come"*; and in view of the fact that we got along very satisfactorily for more than one hundred and five years without any law whatever against embezzlement by fiduciaries (*Viedt* v. *Evening Star Co.*, 19 D. C. 534, 539), and that section 841, as we have said, is new, original, exclusive, complete, and the first legislation ever passed here on this subject, it is far more reasonable to believe that retrospective words were purposely omitted in this section than that they were inadvertently left out. The section certainly shows no indication of the inadvertent or unintentional omission of retroactive language, but quite the contrary, if the rules of law and grammar play any part in its make-up or meaning.

Significance and effect must be accorded to the words of this statute. *"May come,"—"coming,"—"shall fraudulently convert,"—"shall forfeit,"—"shall be deemed guilty,"—"shall be punished,"*— are all literally, strictly, and exclusively future. Since the statute expressly includes only those fiduciaries into whose possession property *"may come,"* and only that property *"so coming"* into possession, it impliedly excludes all other persons and property, especially those that had come into possession before the law was passed. The words used have no technical meaning, nor are they ambiguous. They have but one meaning.—that which is attached to them in their ordinary and popular sense—and they must be so construed.

When we speak of a receiver who *"may come"* into possession of certain property, do we mean one who has come into possession thereof, or is now in possession? When we speak of property that *"may come"* into our possession, do we mean property which has come into, or is now in, our possession? The natural meaning of *"may come,"* in the context, is future only, and these words restrict the act to property coming into possession in the future, and to receivers whose possession shall accrue in the future—that is, after the code takes effect. The words cannot lawfully be extended by the court so as to include preacquired property, or receivers whose possession preceded the code, especially in a statute so highly penal and drastic as this.

A statute which enumerates the persons, property and acts within

its purview, thereby excludes all others. *Johnson* v. *Ry. Co.* (C. C. A.), 117 Fed. Rep. 462, 465, 467, 469. *Expressio unius est exclusio alterius* is a universal maxim in statutory construction. *U. S.* v. *Arredondo*, 6 Pet. 691, 725.

Ability, competency, or power is properly expressed by *"can"*. That *"may come"* is not used in section 841 for *"can come"*, is shown by *"coming"* and the context. A receiver is appointed to take possession of property; and therefore to speak of a receiver into whose possession property *"can come"*, involves here an absurdity, in view of the nature of the office.

The judges below do not deny that the language of this law is plain, but they attain the desired retroactive effect, and extend the act to meet the exigencies of this case, by inserting words that are not now in the section.

In *U. S.* v. *Reese*, 92 U. S. 214, this court said (pp. 216, 219, 221):

> "If Congress has not declared an act done * * * to be a crime against the United States, the courts have no power to treat it as such. * * * It is not claimed that there is any statute which can reach this case, unless it be the one in question. * * * This is a penal statute and must be construed strictly. * * * The words employed must be understood in the sense they were obviously used. * * * We must take these sections of the statute as they are. * * * The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. * * * The language is plain. There is no room for construction."

Had Congress designed section 841 to extend to persons and property that had come into possession before the law, it would naturally and distinctly have said so. It was of easy expression. It is only by interpolating words of retrospective effect that the act can receive the construction given it by the courts below. Practically the only ground upon which the arguments of the judges below for going beyond the letter of the statute rests, is the want of any apparent reason why the legislature should have made a distinction between receivers into whose possession property *"may come"* and those into whose possession property had come, and between property *"coming"* into possession and that which had come into pos-

session. Undoubtedly the law might wisely and justly have been extended to both classes of persons and property, with proper provisions for vested rights or claims to commissions, costs and charges, but the courts have no power to interpolate words necessary to accomplish that end. They have nothing to do with the motive actuating the legislature. *Bank* v. *Berlin,* 26 App. D. C. 218, 222, *per* Shepard, Ch. J., quoted *supra.*

The trial judge, as we have said, inserts the words *"may be"* for *"may come"*, and the appellate judge interpolates (R. 78) *"may have passed"*. The object of each was the same—to extend the statute to fit this case. Of course, the interpolation of *"may have passed"* requires the insertion of *"passed"*, in addition to *"coming"*, for the latter is not responsive to the retrospective expression.

The trial judge also interjected hard labor as part of the punishment under section 841; but as this was of no practical consequence (R. 84), the appellate court struck it out (R. 84-85).

In *Bolles* v. *Outing Co.,* 175 U. S. 262, this court said (pp. 265, 268):

> "The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain it will be construed as it reads, and the words of the statute be given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute was remedial. * * *
>
> "The language of this section when examined seems hardly susceptible of two interpretations, unless certain words which are not found there are treated as interpolated. * * *
>
> "Had Congress designed the extended meaning claimed for these words 'found in his possession', it would naturally have used the expression 'found in or traced to his possession', or 'found to be, or to have been, in his possession.' It is only by interpolating words of this purport that the statute can receive the construction claimed."

In *U. S.* v. *Eaton,* 114 U. S. 677, this court said (p. 678):

> "It is necessary that a sufficient statutory authority should exist for declaring any act or omission a

> criminal offense; and we do not think the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargerine to omit to keep books and render returns * * * it would have done so distinctly."

In *Beitzell* v. *D. C.*, 21 App. D. C. 49, the court said (p. 61):

> "At any rate, it would seem to be reasonable to presume that if it had been the intention of Congress to make the provisions of the act apply to soliciting agents for the owners of goods beyond the District, that intention would have been expressly declared, and not left to doubtful conjecture."

Since *"may come"* denotes future action or motion, it therefore requires *"into"* and *"coming"*, both of which are found with it in the statute. The trial court's interpolated words *"may be"*, indicate inaction or rest—the reverse of *"may come"*—and, therefore, require *"in"* and *"being"*, neither of which is found in the law, any more than *"may be."* If we read out *"may come"* and read in *"may be"*, we must also read out *"into"* and *"coming"* and read in *"in"* and *"being"*. This is not construction, but creation—judicial legislation.

"May be" generally means *"may hereafter be"*, under the rule against retrospective construction.

The trial judge, in the course of his opinion, holding that *"may come"* means *"may be"* and is retrospective, accurately used this very phrase in its prospective sense, as follows: "It was as much the intention of Congress, by this section, to reach the cases of receivers already in possession of property as it was to reach the cases of receivers who *may be appointed tomorrow* and who *may come into possession of property tomorrow.*" How would *"yesterday"* read in lieu of *"tomorrow"*? *"May come tomorrow"* is sense; *"may come yesterday"* is nonsense. The same is also true as to *"may be."*

"Coming" in its adjective sense refers only to the future or expected. Neither in its participial nor adjective sense can the word be forced to apply to the past in the context. Property that has come into possession is as sharply distinct as language and law can describe it from property coming, or that may, shall, or will come into possession. Pre-acquired and after-acquired property are separate and distinct things, both in law and fact. Where a statute

describes the property intended to be included by plain and unambiguous words of a purely prospective meaning, the court is bound to restrict the words of the law to the future.

In section 841 *"coming"* is used only as descriptive of the property made the subject of embezzlement; and if it be possible to conceive any reasonable doubt that property that *"may come"* into possession is only after-acquired property, this conclusion is intensified —nay, made a certainty—by the subsequent use of *"coming"*, which refers, and can refer, only to the future, and never by any possibility to the past in the context; that is to property which may, shall, or will come into possession after the code, not before; to receivers whose possession may, shall, or will accrue after the code, not before. The act provides that any receiver shall be deemed guilty of embezzlement of the entire amount or value of the money or other property *"so coming"* into his possession and converted or appropriated. How is it reasonably possible to say that this means or includes money or other property which had come into his possession long before the code was passed or even thought of? Is there no distinction between pre-acquired and after-acquired property? Is there no difference between the past and the future?

In *U. S.* v. *Heth*, 3 Cranch 398, the act of May 10, 1800, which the court construed, read thus: "That in lieu of the commissions heretofore allowed by law, there shall, from and after the 30th of June next, be allowed to the collectors of the districts * * * two and a half per centum on all moneys which shall be collected and received by them * * * for and on account of the duties *arising* on goods * * * *imported* into the United States."

It was unanimously held that the collectors were not by this act restricted to 2½ per cent. commission on the moneys collected and received by them after June 30, on account of bonds previously taken for duties arising on goods imported into the United States.

In the separate opinions of the Justices of this court (pp. 407-414) very careful consideration was given to the language of the act, and especially to the time referred to by the words *"arising"* and *"imported"*, each of which of itself was indefinite in this respect; and each was held to be prospective only, and to be read as if the word *"hereafter"* had expressly preceded it, under the rule against retrospective construction.

If that statute was correctly construed—and the case has been

approved time and again—how is it rationally possible to say that section 841 applies to persons and property that had come into possession before it was passed? There was some ambiguity about the statute in the *Heth* case, in the respects stated, else there would have been no controversy; and there was some reason to contend for a retrospective reading of that statute; but there is none whatever as to section 841, for *"may come"* and *"coming"* are in no possible manner indefinite as to time. *They refer to the future or nothing.* In the *Heth* case the Attorney General said that the law was too clearly retrospective for the point to be argued at all; but every member of the court held it purely prospective.

Since Congress, in its use of the verb *come* in section 841, could have used any one or more of four tenses of the potential mood, as well as many other forms of expression, can it be said that its use of *"may come"* was inadvertent? It could have said: Any receiver into whose possession property (1) *may come,* (2) *might come,* (3) *may have come,* (4) *might have come,* etc. Courts must assume that Congress knows the meaning of words and the rules of grammar, especially in highly penal statutes. The use of the present potential *"may come"* to express a conditional or doubtful future event is most common and correct. It is impossible to find any retrospective intent in the language of section 841. This can only be done by interpolating words of retroactive effect which it must be presumed were omitted designedly; but whether designedly or not is immaterial, since the necessary words are not there. The judges below concede that the intention of Congress which they ascribe to the act *is not found in its language,* but in considerations entirely *dehors* the words of the law. This is not construction, but creation in the most emphatic and pronounced sense.

Hundreds upon hundreds of instances appear in R. S. U. S. and the later acts of Congress of the use of *"may"* in the future sense. The internal revenue laws alone, as collated in 3 *Fed. St. Ann.* 556-807 (1904), show more than 200 such examples.

There never has been a single instance in the books of law, literature, lexicography, logic, language or philology, of the use of the simple auxiliary *"may"* in the past sense, until this case. The thing is impossible from any rational standpoint. The same is true of *"coming"* without the copula. No amount of arguments or reasons

of the judges below can change the plain meaning or grammatical construction of section 841.

Naturally—indeed necessarily—there is no other case in the books in which a penal statute, directed against persons *into* whose possession property *may come* or *shall come* in a certain character, who shall convert to their own use the property so *coming* into their possession, has ever been attempted to be applied to persons and property that had come into possession before the law was passed. The thing is incomprehensible and impossible. The instant case stands absolutely alone as a specimen of statutory misconstruction. It is *sui generis*. Judicial legislation in criminal cases is not uncommon, but of the many instances that we can find, none equals this in its bald perversion of law and language.

(3) Prospective Effect of Shall, in Section 841.

"May come" answers to *"shall come"* with *"if"*. Had section 841 begun with *"if"*, it would have continued with *"shall come"* instead of *"may come"*. This form of expression is used in some other sections of the code, and in the repealed embezzlement law of 1878. Section 841 can be remodeled and the exact prospective meaning preserved as follows: *If* any receiver shall fraudulently convert to his own use any money of another which *shall come* into his possession, etc. Authorities on the meaning and effect of *"shall"* in statutes are therefore in point. *"Shall"* itself is used four times in section 841.

Section 1 of the act of Feb. 4, 1878, carried forward in enlarged terms as section 833 of said code provided:

> "If any officer * * * in the service of the District of Columbia * * * shall embezzle or wrongfully convert to his own use * * * any money * * * belonging to said District * * * which *shall come* into his possession * * * he shall * * * be punished" by fine or imprisonment or both.

Code D. C. section 834 is section 2 of the act of Feb. 4, 1878, carried forward, and reads:

> "If any agent * * * shall wrongfully convert to his own use * * * anything of value which *shall come* into his possession * * * he shall be deemed

guilty of embezzlement, and shall be punished" by fine or imprisonment, or both.

No attempt was ever made to apply the act of 1878 to an officer or agent into whose possession the property alleged to have been embezzled had come before the law was passed, though embezzled thereafter.

Code D. C. section 48 relates to money collateral which *"shall be deposited"* under police court proceedings, and provides that "any person * * * who shall wrongfully convert to his own use" the same "shall be deemed guilty of embezzlement", and shall be punished by fine or imprisonment or both. This section also uses the terms "may give,"—"may be apprehended,"—may be,"—"may be deemed,"—"may * * * commit"—"may be adjudged,"—"may be called," etc., in the future sense. It is under a chapter totally different from that under which section 841 appears, though the appellate judge states (R. 77) that "the chapter of which this section [841[forms a part undertakes to define and punish every species of embezzlement." Nearly 800 sections and 17 chapters intervene between sections 48 and 841. The statement is otherwise incorrect.

In view of their decision in the *Berlin* case, *supra*, and that in the case at bar (R. 77-78), how would the judges below construe the *"shall be deposited"* of section 48? Would they read in *"has been deposited"* Because the section is intensely penal, the question must be answered affirmatively; yet we cannot see the difference in effect between the *"shall be rendered"* of the *Berlin* case, under section 1214, and the *"shall be deposited"* of section 48, so far as time is concerned.

Both judges below say, almost in terms, that if section 841 had read *"shall come"* instead of *"may come,"* this would not have changed their conclusions. The trial judge quotes as his sole authority a case construing *"shall come"* in a purely remedial statute; and the appellate judge quotes the embezzlement section 833 of the code using *"shall come into his possession"* (R. 77), and admits (R. 78) that the *Mannix* case, *supra,* (*"shall come into his possession"*), is in point.

Undoubtedly, if *"may come"* and *"coming"* are retrospective and refer to the past, then *"shall come"* is also retrospective and denotes the past. *English grammar is thus completely reversed.*

During the course of the opinion, fully supported by authorities cited, in the case of *Jones* v. *Stockgrowers Nat. Bank,* 17 Colo. App. 79, the court said (p. 85):

> "Here there are no qualifying words, although it would have been easy for the legislature, if it had intended that the act should apply to existing judgments, to have clearly manifested such intent by the simple insertion of the words '*or have been*' after the words '*shall be*' in the extract which we have here just quoted."

The cases are unanimous to the point that a statute, directed against any receiver into whose possession property *"shall come,"* who shall convert to his own use the property so *"coming"* into his possession, has no application whatever to one into whose possession the property alleged to have been embezzled had come before the law was passed or took effect. Such an act has no retroactive effect whatever, but is prospective only, and sharply restricted to persons and property that may come into possession in the future. It applies exclusively to future matters and events. The necessary effect of *"shall"* is directly so defined and applied in the following cases, the operative words in each being given:

U. S. v. *Burr,* 159 U. S. 78, 87 (shall be levied, and shall be exempt. *U. S.* v. *Goldenburg,* 168 U. S. 95, 102 (shall give notice, and shall pay). *National Sewing Machine Co.* v. *Wilcox & Gibbs Sewing Machine Co.,* 74 Fed. Rep. (C. C. A.) 557, 559 (shall be). *Murphy* v. *McKeon,* 53 N. J. Eq. 406, 412 (shall die). *Giles* v. *Giles,* 22 Minn. 348, 349 (shall be deserted, and may bring). *Beard* v. *State,* 74 Md. 130, 133 (shall keep). *Johnson* v. *Johnson,* 52 Md. 668, 670 (shall be instituted, and may be commenced, and shall take place). *Meadowcraft* v. *People,* 163 Ill. 56, 78 (embezzlement by insolvent banker who shall receive deposits which shall be lost to the depositor). *Chapman* v. *Holmes,* 10 N. J. L. 20, 26 (shall, and will). *Stisser* v. *Ry. Co.,* 32 N. Y. App. Div. 98, 101 (shall not be used in constructing). *Evans* v. *Page,* 5 A. & E. (N. S.) 767, 772 (shall be deemed). *In re Tuller,* 79 Ill. 99, 107 (a marriage shall be deemed a revocation of a prior will). *Dewart* v. *Purdy,* 29 Pa. St. 113, 117 (shall have been made). *In re Schedel's Estate,* 73 Cal. 594, 598 (shall have died). *Porritt* v. *Porritt,* 16 Mich. 140, 141 (shall have become). *Wheadon* v. *Gorham,* 38 Conn. 408, 412 (shall have,

and shall have levied). *Alden* v. *City of Newark*, 40 N. J. L. 92, 96 (shall have been given). *People* v. *Peacock*, 98 Ill. 172, 176 (unpaid taxes shall bear interest). *People* v. *Green*, 58 N. Y. 295, 301 (shall accept an office, and shall be deemed thereby to have vacated his office, do not apply to an office held when the act was passed). *Northwestern Ins. Co.* v. *Seaman*, 80 Fed. Rep. 357, 358 (shall hereafter be appointed, and may be a member). *Humbolt* v. *Christopherson*, 73 Fed. Rep. (C. C. A.) 239, 247 (shall exercise, and shall become). *Dugger* v. *Mechanic's Ins. Co.*, 95 Tenn. 245, 251 (are and shall be null and void). *City Ry. Co.* v. *Citizens R. Co.*, 166 U. S. 557, 564, 565 (shall have power, and shall be submitted, and shall be approved). *Perkins* v. *Perkins*, 7 Conn. 558, 563, (shall be brought). *In re Strawbridge*, 39 Ala. 367, 375 (shall be exempted). *Thomas* v. *Courtney*, 1 B. & A. 1, 8 (shall and will release).

In re Birdsall's Estate, 49 N. Y. Supp. 450, 462, 463 (shall be imposed. *State* v. *Mannix*, 9 Ohio Decisions (Reprint), 667, 668 (embezzlement by assignee of property which shall come into his possession). *Ohio Bank* v. *Berlin*, 26 App. D. C. 218, 220 (from the date when the same shall be rendered). *U. S.* v. *American Sugar Co.*, 202 U. S. 563, 578, 579 (shall continue, and shall remain, and shall receive, and shall be admitted).

In *Indianapolis Ry. Co.* v. *Kercheval*, 16 Ind. 84, the court said (pp. 88, 90):

> "The amendment applies only to such animals as '*shall be*' killed. '*Shall be*' clearly indicates the future, and not the past. There is nothing in the amendment which indicates, so far as we can discover, an intent on the part of the Legislature to make it retrospective and embrace animals previously killed. * * * We think, both on principle and authority, it should be held to be prospective only, and not applicable to animals killed before the act took effect."

This case was cited in *Shoemaker* v. *Smith*, 37 Ind. 122, 128, already mentioned, as authority for holding that *"may be intrusted"*, in a statute, "cannot have reference to the fund that had already been intrusted to the counties, because it speaks for the future and not for the past. It contemplates a future intrusting of the fund, or some part of it, to the counties."

If *"shall"* is thus construed in purely civil and remedial statutes,

it should at least be as strictly construed in highly penal acts; but the judges below have flatly reversed the rule of strict construction of penal statutes, and that against retrospective construction, in their complete renactment of section 841, and their intense anxiety to make a law to fit this case. We have abiding faith in our contention that in their exceeding zeal they have utterly misconstrued this law. Antipodes of tense or time must remain so; no judge has the right to reverse them in construing a statute, on the common but mistaken assumption that his will is the legislative will.

(4) Retrospective Construction of Section 841 Prohibited.

(1) In the absence of compulsory language to the contrary in the acts themselves, all statutes "are construed as operating only on cases and facts which come into existence after the statutes were passed." *Endlich Inter. Stat.* 271. By this rule, even in the absence of its compulsory language requiring a purely prospective construction, section 841 is properly construed as operating only on a possession which comes into existence after its enactment. All of the elements and facts necessary to make a case within its purview, must arise after it took effect.

It is idle indeed to say that the words of section 841 are so clear, strong and imperative, that no other than a retrospective meaning can be annexed to them, or that the intention of the legislature cannot be otherwise satisfied; but, on the contrary, they are so clear, strong and imperative that no other than a prospective meaning can be annnexed to them, and the act can be given full force and effect, as we have said, by applying it exclusively to after-possessed fiduciaries and after-acquired property, and the intention of the legislature can thus be fully satisfied. The law includes, and was clearly intended to include, only those fiduciaries into whose possession property *"may come"* who shall fraudulently convert to their own use the property so *"coming"*. No enlargement of its language is necessary. The time when possession is acquired is an exp[illegible] condition precedent to its operation, and whether reasonable or not is no proper concern of a court.

In *U. S.* v. *American .Sugar Co.*, 202 U. S. 563, this court said (pp. 577, 579):

> "We are to remember there is a presumption against retrospective operation, and we have said that words in

> a statute ought not to have such operation 'unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied'. * * * We cannot suppose that, if Congress intended to give retrospective operation to the act, it would have used the words that expressed the contrary."

Such is the settled doctrine of this court. *Chew Heong* v. *U. S.*, 112 U. S. 536, 559. *U. S.* v. *Burr*, 159 U. S. 78, 82. *U. S.* v. *Heth*, 3 Cranch 398, 413.

In the *Heth* case it was further said (p. 413): "This rule ought especially to be adhered to when such a construction will alter the pre-existing situation of the parties, or will affect their antecedent rights, services, or remuneration." Here, under the forfeiture clause of section 841, the accused *"shall forfeit all right or claim to any commissions, costs, and charges"* on the trust fund, which commissions, etc., in this case amounted to nearly $10,000 before the law was passed (R. 36).

(2) Construed retrospectively to include and forfeit all vested rights or claims to any commissions, costs and charges earned and allowed before the code, section 841 is unconstitutional and void; and this furnishes an additional reason against such construction. *U. S.* v. *Louisville Canal Co.*, 4 Dill. 601, 611. *Bartlett* v. *Ball*, 142 Mo. 28, 36. *Southwestern Co.* v. *McBride*, 185 U. S. 499, 503.

(3) The fact that the code is expressly limited to take effect in the future, also affords a powerful reason against a retrospective construction. In *Dewart* v. *Purdy*, 29 Pa. St. 113, the court construed a statute relating to the partition of real estate in any court wherein a valuation *"shall have been made"* of the whole or parts thereof, and said (p. 117):

> "Nothing short of the most indubitable phraseology is to convince us that the legislature meant their enactment to have any other than a prospective operation, and when they fixed a future day for it to take effect they stamped its prospective character on its face. * * *
>
> "This phrase, *'shall have been made'*, is an instance of the future perfect tense. It contemplates a valuation perfected, but perfected in the future, and the future of this statute was all subsequent to a specified date.

Had it been repealed before that date, it would have had no future existence, and no operation whatever. Though not repealed, it must not have a construction that would give it effect during the period of its suspended animation, for this were to violate the will of its creator.

"Giving then to the words before us their genuine grammatical meaning, we hold them applicable not to a valuation made after the enactment of the law but before it took effect, but only to valuations made after the law went into operation; and thus construed, the statute commences for every purpose *in futuro*, as Blackstone says all laws should do.

"It follows that this case is not within the purview of the new enactment."

The principles above quoted are well settled as to statutes limited to take effect *in futuro*. *Jackman* v. *Garland*, 64 Me. 133, 136. *Charles* v. *Lamberson*, 1 Iowa 435, 442. *People* v. *Wayne*, 37 Mich. 287, 290. *Andrews* v. *Ry. Co.*, 16 Mo. App. 299, 305. *Harding* v. *People*, 10 Colo. 387, 392. *State* v. *Musmore*, 14 Wis. 163, 174. *Paddon* v. *Bartlett*, 3 A. & E. 884, 895.

(4) "It is not enough that the language is general enough to cover past transactions to justify a retroactive construction. Every reasonable doubt is resolved against a retroactive operation of the statute." *Stewart* v. *Vanderwort*, 34 W. Va. 524, 530. *Dyer* v. *City*, 88 Me. 140, 143, 145. *Berdan* v. *Van Ruper*, 16 N. J. L. 7, 10, 14. *State* v. *Thompson*, 41 Mo. 25, 26, 28. *Finney* v. *Ackerman*, 21 Wis. 268, 270. *White* v. *Crawford*, 84 Pa. St. 433, 436. *Eddy* v. *Morgan*, 216 Ill. 437, 448.

A statute of South Carolina requiring sheriffs, at the expiration of their term of office, to turn over books, papers, writs, etc., and executions *levied*, upon which sales had not been made, was held not to include executions already levied by the sheriffs in office prior to the statute, as it does not extend to such sheriffs. *Osborne* v. *Huger*, 1 Bay 176, 195.

Act 22 and 23 Vict. provides that "when a trustee, executor or administrator *shall not* by some instrument creating his trust, be expressly forbidden" to invest the trust funds in certain securities, he *shall not* be liable for loss resulting therefrom. This statute was held prospective only, and to have reference exclusively to trustees, executors, and administrators whose appointments were made and

funds received subsequent to its enactment. *Re Miles' Will*, 27 Beav. 579, 582.

The Virginia act of 1787, as to possession of slaves, does not apply to a possession acquired before it took effect. *Turner* v. *Turner*, 4 Call. 234, 237.

In *Dugger* v. *Mechanics Ins. Co.*, 95 Tenn. 245, the contention was that the statute applied to existing policies, but the court replied (p. 251):

> "The contention of the defendant that this statute is retrospective rests alone upon the use of the verb '*are*' in the clause 'all stipulations in such policies to the contrary *are and shall be* null and void.' We think to adopt the view of defendant the court would depart from the well-established rule of construction above cited, and would impose upon the act as a whole a strained and unnatural meaning."

In *United Mines Co.* v. *Hatcher*, 79 Fed. Rep. 517 (C. C. A.), the court, construing a lien law, said (p. 520):

> "The amendment of 1895 must be held to have a prospective operation only, and to be applicable only to leases made after its enactment."

In the two following cases the words stated were held to apply only to future events:

> *U. S.* v. *Starr*, Hempst. 469, 471 (all crimes committed.)
>
> *Prince* v. *U. S.*, 2 Gall. 204, 209 (captured and brought into the United States. *Nova constitutio futuris formam imponere debet, et non preteritis.*)

When Congress means an act to be both prospective and retrospective, it almost invariably uses specific words to express that intention. This is especially true in statutes using *"may"*. See, for examples, R. S. U. S. sections 3455, 3462, 3464, 3410, 3444, 3450, 1892, 1894, 5540, 5543, 5546, 5549, 2461, 1041, 3369; act of April 12, 1902, section 3, 32 Stat. L. 97, 98; act of June 27, 1902, section 3, 32 Stat. L. 406; act of March 1, 1879, section 11, 20 Stat. L. 342.

In *Eddy* v. *Morgan*, 216 Ill. 437, the court said (p. 447):

> "The rule of liberal construction is never carried to the extent of giving the act retrospective effect unless there is something in the act itself which indicates the intention so to do."

What is there in section 841 itself to indicate such an intention? Neither judge below found anything whatever; but the trial judge resorted to the *"no reason"* argument, and the appellate judge to the same argument, and to other sections and considerations entirely *dehors* the act, in order to force such effect.

(5) Unconstitutionality of Section 841 Construed Retrospectively.

(*a*) There is nothing in or out of section 841 to warrant a prospective construction of some of its provisions and a retrospective construction of others. If pre-possessed receivers and pre-acquired property are included, then previously vested rights or claims to commissions, costs and charges must also be included. Concededly (R. 77) the act of conversion must be prospective; yet the language of the law as to it is just the same in words or effect as that concerning the persons, property, forfeiture, offense, fine and imprisonment. It would simply be judicial juggling with this statute to construe it to include persons and property that had come into possession before it was passed, but to exclude rights or claims to commissions, etc., which had vested before its enactment.

By reason of its forfeiture clause, the lower courts' retrospective construction of section 841 renders it unconstitutional and void. The law cannot be valid unless it be restricted to what it plainly says—persons and property that may come into possession after the code takes effect. Read according to its plain terms and intent, the statute is entirely free from the constitutional objections to which a retrospective construction necessarily subjects it.

In the case at bar, the indictment charges that the money alleged to have been converted came into possession before the code was passed, at some unstated date. The evidence fixes this date as June 28, 1895. (Testimony of Dr. Young, R. 37.) This was nearly six years before the code was passed, and almost seven years before it took effect, as we have said. The proof (Auditor's Reports, R. 35-37) further shows that the commissions, costs, and charges on the said money amount to $10,070.82, and that of this sum nearly $10,-

000.00 was adjusted and allowed under various orders of the court before the code was passed. By the judgment in this case establishing the alleged conversion, *the plaintiff in error forfeits "all right or claim to any commissions, costs and charges,"* on the said money, if section 841 be valid as applied to the instant cause. These commissions, costs, and charges were vested rights of the accused at the time the code was passed, and Congress was without power to forfeit them, if it has included pre-acquired property rights under section 841. This the lower courts say Congress has done, and they hold that the act includes money which had come into possession on June 28, 1895. Applied to vested property rights, as in the case at bar, section 841 is unconstitutional and void.

The forfeiture necessarily follows the conversion; and hence the act is in effect a bill of attainer which confiscates one's property. The forfeiture is inflicted summarily and without due process of law. The statute does not otherwise provide to whose or to what use the forfeiture shall inure; and therefore, as it must accrue to the United States that enacted the law, and as this use must be public, the result is to take private property for public use without just (or any) compensation.

If the law applies without distinction to both pre-acquired and after-acquired property rights and is unconstitutional and void as to the former, for the reasons stated, or any of them, then it is equally void as to the latter, for the same reasons; but if it applies only to the latter, and only to commissions, costs, and charges arising after—not before—the law, then it is valid. The section cannot be constitutionally applied to money which came into possession on June 28, 1895, so as to operate a forfeiture of almost $10,000.00 in commissions, costs and charges thereon, which had lawfully vested before the statute was passed, or the alleged conversion occurred. The act must apply in all of its details, or not at all. If any one of its provisions be unconstitutional as applied to pre-acquired property rights, the court cannot cut it out by construction, in order to meet the exigencies of the particular case. Many statutes are valid when construed prospectively, but invalid retrospectively. Indeed, it may be safely said that the Constitution itself is the most potent cause of the rigid rule that requires every statute to be construed prospectively, unless there be no escape from retrospective construction. The courts below have applied this rule reversely to the in-

stant case, with disastrous results. Construed properly, that is, purely prospectively, and restricted to after-acquired property rights, the act is valid; but construed improperly—or rather re-edited, revised, recast, and re-enacted—that is, retrospectively, and extended to pre-acquired property rights, the law is invalid; and, as the latter construction was adopted and enforced in the present case, the judgment must fall.

Due process of law means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of the right of life, liberty or property. *Pennoyer* v. *Neff*, 95 U. S. 714, 733. *Hargar* v. *Reclamation District*, 111 U. S. 701, 708. A statute which operates to take the private property of one person, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the federal constitution. *Mo. P. Ry. Co.* v. *Nebraska*, 164 U. S. 403, 417. The denial of any vested property right by a constitution or statute subsequently adopted, is deprivation of property without due process of law. *Houston* v. *Texas*, 170 U. S. 243, 261. The legislature cannot summarily forfeit property innocent in itself, by way of penalty or punishment for its wrongful use. *McConnell* v. *McKillip*, 65 L. R. A. 610, 615 (Neb. 1904). Congress cannot deny to temporary or permanent residents of the District of Columbia the equal protection of the laws; nor arbitrarily take away their real or personal property, nor their right to pursue any legitimate trade, calling, or profession; as all of the constitutional guaranties of life, liberty, and property are equally for their benefit as for persons residing in the States. *Lappin* v. *D. C.*, 22 App. D. C. 68, 76. In *Building Association* v. *Fiske*, 20 App. D. C. 514, 520, the court held that code section 692, providing that premiums to be charged by building associations organized under the code, shall not be deemed usurious, is not retroactive, and cannot constitutionally apply to a right to redeem which existed before the code took effect, although it arose after the code was passed. *Endlich Inter Stat.* Sec. 271. *Wade Retroactive Laws*, Secs. 156-197. *People ex rel. McPike* v. *Van De Carr*, 178 N. Y. 425, 428. In *Wynehamer* v. *People*, 13 N. Y. 378, 382, 406, 428, 447, 458, 459, 486, 487, a statute authorizing the summary confiscation and destruction of intoxicating liquors was declared void, as violating the provision of the constitution which declares that no person

shall be deprived of life, liberty, or property without due process of law. It was held that the legislature might constitutionally prevent the future manufacture or importation of such liquors. But it was further held that, inasmuch as the act did not discriminate between such liquors as were possessed when it took effect as a law, and such as might thereafter be acquired by importation or manufacture, and did not warrant any defense based on that distinction, it could not be sustained in respect to any liquor, whether owned at the time the act took effect, or acquired subsequently.

In *Fletcher* v. *Peck*, 6 Cranch 87, 138 *Chief Justice Marshall* said:

> "A bill of attainder may affect the life of an individual, or may confiscate his property. * * * The legislature is, then, prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment."

Applied, as in this case, to pre-acquired property rights, section 841 confiscates all of the accused's property in the commissions, costs, and charges, which vested before the law was passed; and hence it is, in effect, a bill of attainder. The accused's whole vested estate in the commissions, costs, and charges, is, by this statute, as construed by the courts below, forfeited absolutely, and "seized for a crime which was not declared, by some previous law, to render him liable to that punishment." Congress is prohibited from passing such a law.

In *Turner* v. *Turner*, 4 Call. 234, the court said (p. 237):

> "A legislative interpretation, changing titles founded upon existing statutes, would be subject to every objection which lies to *ex post facto* laws, as it would destroy rights already acquired under the former statute, by one made subsequent to the time when they became vested—a power to be deprecated, as oppressive and contrary to the principles of the constitution."

It is very certain that if Congress had intended to deprive fiduciaries of the commissions, costs and charges due and owing to them when the act was passed or took effect, and to forfeit all vested rights or claims to such commissions, etc., it would have used appropriate

language to express that intention, and would necessarily have made some provision for the disposition thereof; otherwise the law must be void.

In *Southwestern Co.* v. *McBride,* 185 U. S. 499, the court construed the Curtis act, making it unlawful by section 16 for any person, after the passage of the law, to claim, demand, or receive for his own use, or the use of any one else, any royalty on coal, or any rents on any lands or property of certain Indian tribes or nations in the Indian Territory, or for any one to pay to any individual any such royalty or rents. Section 18 made the violation of the act a misdemeanor. The sole question presented and decided was whether or not this statute was retrospective so as to include royalties or rents due and payable when the act was passed. The court quotes section 16 in full and holds that it is prospective only, as did the court below (43 C. C. A. 652, 104 Fed. 473). The court also adopts the reasoning of the court below, and quotes with approval from that opinion. The court says (pp. 503-504):

> "The function of the legislature is to prescribe rules to operate upon the actions and rights of citizens in the future. While, in the absence of a constitutional inhibition, the legislature may give to some of its acts a retrospective operation, the intention to do so must be clearly expressed, or necessarily implied from what is expressed; and, assuming the legislature to possess the power, its acts will not be construed to impair or destroy a vested right under a valid contract unless it is so framed as to preclude any other interpretation. If Congress had intended to deprive lessors of the royalties due and owing to them at the date of the act, it would have used appropriate language to express that intention, and would necessarily have made some provisions for the disposition of such royalties. But it is clear from the language of the act that it does not deal with royalties already paid, or already due and owing to lessors under leases for coal already mined. * * * Congress, by the Curtis Act, neither attempted nor intended to interfere with the rights of lessors to royalties due them under their leases at the date of the passage of the act."

Did Congress, by section 841, attempt or intend to interfere with or divest the rights of receivers to costs, charges, and commissions

vested in them when the code was passed? If not, then it neither attempted nor intended to include pre-acquired property or receivers already in possession. Here these costs, charges, and commissions, vested when the code took effect, as we have seen, amounted to nearly ten thousand dollars (Auditor's Reports, Schedules A., R. 36).

The appellate judge recognizes the invalidating effect of his retrospective construction on the forfeiture clause. He says (R. 84) that the forfeiture "is not part of the punishment * * * of the offense", but "if effective" is a matter for the chancery court. There is no need for the "if effective" under an exclusively prospective construction, as there can be no question of the validity and effectiveness of the forfeiture clause so read. It is the court, not Congress, that creates the invalidity.

(*b*) The forfeiture clause construed retrospectively being unconstitutional and void, operates to nullify the entire section 841, because it is a single section complete in itself, and has no parts capable of separation within the meaning of the rule which permits the court to enforce the good and reject the bad. To cut out the forfeiture clause is to limit by construction, not by separation. This point was fully considered in *Baldwin* v. *Franks*, 120 U. S. 678, and the cases therein cited and reviewed, and the court said (p. 685):

> "To give effect to this rule, however, the parts—that which is constitutional and that which is unconstitutional—must be capable of separation, so that each may be read by itself. This statute [*R. S. U. S.* Sec. 5519] considered as a statute punishing conspiracies in a State, is not of that character, for in that connection it has no parts within the meaning of the rule. * * * A single provision which makes up the whole section, embraces those who conspire to deprive one of his rights under the laws of a State, and those who conspire to deprive him of his rights under the Constitution, laws, or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation."

(*c*) Even considering section 841 as having parts, the rule cannot apply because all are so dependent, and so mutually connected with the forfeiture and each other, and are so indissolubly associated and interwoven in the law, that they were intended as a

whole, and, if all could not be carried into effect, Congress would not have passed the act as it would read with the forfeiture clause out. Indeed, so closely conjoined are the provisions of the law that there is not even a semi-colon, still less a colon or period, between the first and last words of the section, but commas are the only punctuation marks used.

With the forfeiture clause out because unconstitutional and void, what is then left makes it plain that the section would not have been enacted in the mutilated form. The maximums of the fine and imprisonment are left out of all proportion. This is made certain by reference to other sections which contain no forfeiture clause, and especially by an examination of the former embezzlement law of 1878, which had no forfeiture clause, but prescribed a maximum fine of five thousand dollars, and a maximum imprisonment of five years, or both. A comparison of section 841 with other and former laws renders it quite clear that, with the forfeiture clause eliminated, the maximum fine would have been not less than ten thousand dollars, in view of the fiduciary character of the persons included in the act. The rule is, that unless Congress would have passed the act with the same fine and imprisonment that it now prescribes, and in all other respects in the very form it would have if the forfeiture clause had been omitted, then the unconstitutionality of the forfeiture clause destroys the whole section; and this, too, without in any manner ignoring the principle that an act unconstitutional in part may stand as to the valid part; and also applying to a single section the rule applicable to a law of more than one section. *Poindexter* v. *Greenhow*, 114 U. S. 270, 304. *Pollock* v. *Farmers' Loan and Trust Co.*, 158 U. S. 601, 635, 637.

This court cannot say that Congress would have passed section 841 as it would read with the forfeiture clause out; nor can the court read out of the section the unconstitutional forfeiture clause, which Congress inserted, "for the purpose of bolstering up its constitutionality." Section 841 must be construed retrospectively in order to include prior-possessed receivers and pre-acquired property; but such construction necessarily shows the invalidity of the forfeiture clause, and this leads inevitably to the conclusion that the law was intended to be purely prospective and constitutional—in other words, that Congress meant just what it plainly said, and no more.

(*d*) Construed and enforced according to its simple, plain, and unambiguous terms, and applied only to after-acquired property or possession, and to commissions, costs, and charges, non-vested at the time the law took effect, section 841 is entirely valid. Here the difficulty arises from the action of the lower courts in applying the law to a case foreign to both its letter and spirit. The vice lies not in the law, but in its application. We endeavor to show that the act has no application to this case; and what we have already said has been stated with this purpose in view; because it must be assumed that Congress intended to pass a constitutional law and that it should be enforced as passed, and not otherwise—that is, constitutionally and not unconstitutionally.

Let us add that, in determining what persons and property are made subject to section 841, there is no question of *ex post facto* law. Every *ex post facto* law is retrospective; but every retrospective law is not *ex post facto*. Technically and properly so-called, *ex post facto* laws are criminal only; retrospective laws are both civil and crimnial. The former refer only to the prior fact or act made a crime; the latter may refer to any prior or existing fact, act, matter, state, or thing whatsoever, whether civil or criminal. We shall see hereafter that in so far as the trial court admitted evidence of many alleged acts of conversion prior to the code, and as far back as 1897, it gave an *ex post facto* effect to section 841; but this is a matter very different from the persons and property made the subject of the law. With respect to property, a statute which deprives a man of his estate, or any part of it, for a crime which was not declared to be an offense by any previous act, is void. *Fletcher* v. *Peck*, 6 Cranch 87, 138. With respect to liberty, the Constitution forbids the deprivation of liberty of action as well as of person. *Lochner* v. *New York*, 198 U. S. 45, 53.

We therefore submit that section 841, construed retrospectively and as so applied in this case, is unconstitutional and void. It seems to us that this effect of a retrospective construction and application makes it certain that the statute is prospective only, and has no application to the instant case.

(6) Opinions of Inferior Judges on Section 841.

A most powerful argument against the construction given to section 841 by the judges below is found in their own labored opinions,

which expose the fatally defective reasons on which they proceed. Nothing is more difficult in law or logic than an attempt to dissipate a self-evident proposition. The impossible still remains impossible. Language relating only to future events cannot be forced to apply to past events, unless courts can usurp the functions of Congress.

Section 841 applies by its terms or letter only to a fiduciary into whose possession property *"may come"*, who shall convert to his own use the property *"so coming into his possession"*. A receiver into whose possession the property alleged to have been embezzled had come before the statute was passed or took effect, is not within the strict terms or letter of this law, and not necessarily within its spirit. Full force and effect can be given to the act, as we have said, by applying it exclusively to persons and property that may come into possession in the future. It cannot be extended to include any person or property not clearly, unmistakably and strictly within *both its very letter and spirit—not either, but both;* and the spirit of the law is to be found in its letter—not in matters *dehors*.

The trial judge simply re-enacted section 841 to include persons and property that had come into possession before the code was passed or took effect, for three reasons, viz: (1) Because there was *no reason* for Congress to exclude them; (2) because Congress did not know the meaning of its own words and the rules of grammar, but meant *"may come"* to mean *"may be"*; and (3) because Congress intended to include them. He ignores the fact that *"may be"* forces out *"into"* and *"coming"*, and he also overlooks some other very material matters. He himself used—perhaps inadvertently but certainly accurately—the very words of the statute (as we have said) in the identical and purely prospective and exclusive sense in which they are there used—"who *may come* into possession of property *to-morrow*". He used the phrase naturally and easily to mean *exactly what he was then saying Congress did not use it to mean.* Is he or Congress right? Both cannot be.

As his sole authority, the trial judge quotes from a case construing an act enlarging the rights of married women; but it is well settled that statutes enlarging the rights of married women are enabling acts, and are to be liberally construed. *Wills* v. *Jones*, 13 App. D. C. 492, 495. *McCarthy* v. *McCarthy*, 20 App. D. C. 202, 203.

Section 841 is not a remedial, but an intensely penal statute, and is not the subject of liberal, but of strict, construction.

In *Chicago Ry. Co.* v. *People*, 216 Ill. 164, the court said (p. 171):

> "Penal statutes are, by well settled principles of law, to be strictly construed, and matters and things which are not clearly included cannot be brought within the operation of such statutes by mere construction."

The trial judge applied to section 841 the rule of liberal construction applicable to married women's acts; but this law and the married women's acts represent extremes of penal and remedial legislation, of strict and liberal construction, of criminal and civil statutes. To construe the former by the rules governing the latter is to ignore the established principles of statutory construction. It is grave error; yet the trial judge reversed the civil and criminal rules of construction, and applied the former to section 841. He went still further, for he constructed and created a new law by reading out *"may come"* and reading in *"may be"*, and then forcing a retrospective meaning of the latter. When you read out *"may come"* and read in *"may be,"* the law of the English language requires you to go still further; for *"into"* and *"coming"* must also go out, as we have said, and be replaced by other pertinent words—*"in"* and *"being"*. The result is certainly creation, not construction. You cannot say: Any receiver *into* whose possession property *may be*, who shall convert the property so *coming*. The allegations of the indictment (R. 1-2) in this case, as we have seen, are that the defendants were appointed as receivers on November 6, 1894 (R. 31), and that their possession was acquired at some unstated date before the code, which date the evidence (R. 37) fixes as June 28, 1895. Therefore, when the code took effect, they were not receivers into whose possession this money or property *"may come"*, because it already had come into their possession. The money or property itself was not such as *"may come"* into their possession, for the same reason. The act is clear on its face, and is fairly susceptible of but one construction—prospective. The language is plain and unambiguous, and refers only to after-acquired property and after-possessed receivers. To hold otherwise "is contrary to the grammatical construction and the plain, natural import of the words. There is no other language in the section warranting an inference that those words were in-

tended to have any other than their literal and natural meaning;" but the other words imperatively demand a purely prospective construction of the words *"may come"* and *"coming"*, and that they shall be read according to their grammatical construction, their plain import, and their literal and natural meaning; and so read and construed, the law has no application to the instant case.

In *Rice* v. *U. S.*, 53 Fed. Rep. 910 (C. C. A.), the court said (pp. 911-912):

> "This paragraph of the statute must be interpreted in the light of the familiar and well-settled rules for the interpretation of statutes, and particularly statutes of this [revenue] character. The paragraph is not obscurely or dubiously worded. The primary rule for the interpretation of a statute requires that it shall be interpreted according to the grammatical sense of the words in which the statute is expressed. That, so construed, the phrase *'embroidered and hemstitched handkerchiefs'* applies to handkerchiefs only which are both embroidered and hemstitched, cannot be gainsaid. * * * The intention of Congress to make a rule different from that which the words of the act plainly express must be extremely clear. Congress is presumed to have used the appropriate words to convey its meaning, and when these words are not of doubtful meaning the court must give them effect. It cannot substitute, for the clear expressions which Congress has actually used, other expressions which the court think Congress ought to have used."

The court quotes (p. 912) from the opinion of the House of Lords in *Partington* vs. *Atty. Gen.*, L. R. 4 H. L. 100, 122, as follows (in part):

> "If the crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. * * * In a taxing statute * * * you can simply adhere to the words of the statute."

Also (p. 912) the following from *U. S.* vs. *Wigglesworth*, 2 Story 369, 374:

> "It is a general rule, in the interpretation of all statutes levying taxes or duties upon subjects or citizens, not to extend their provisions by implication beyond the clear import of the language used, or to enlarge their operation so as to embrace matters not specially pointed out, although standing on a close analogy. In every case, therefore, of doubt, such statutes are construed most strongly against the Government, and in favor of the subjects or citizens, because burdens are not to be imposed nor presumed to be imposed beyond what the statutes expressly and clarly import."

Had the judges below construed the above act by the rule of this case, is it not quite clear that they would have promptly held it to include two classes of handkerchiefs, just as they hold section 841 to include two classes each of persons and property and possession, though each law, strictly construed, plainly includes only one?

The doctrine of strict construction is not mere sound or shadow, but a vital rule firmly controlling all penal statutes. It is often aggressively quoted in principle, but calmly ignored in practice. It was utterly alien to this case in the courts below. It was not even mentioned or noticed by either judge, but each complacently applied the doctrine of liberal construction(?) to a drastic and highly penal statute, in order to effect the judicial intent.

The appellate judge says (R. 77) that "the fact which may be inferred from the indictment is made certain by the evidence, namely, that the money had come into the possession of the receivers prior to the enactment of the code." He then gives (R. 77-78) his reasons for concluding that (R. 78) "section 841 [*'may come * * * so coming into his possession'*] comprehends property that *may have passed* into the defendant's possession as receiver before the time that it went into effect."

In supposed support of this absurd conclusion and irrational construction of section 841, based upon reasons fatally defective under the first principles of statutory construction, he intensifies the fallacy by quoting (R. 77) the following from *Lau Ow Bew* v. *U. S.*, 144 U. S. 47, 59:

> "Nothing is better settled than that statutes are to receive a sensible construction, such as will effect the

> legislative intent, and, if possible, so as to avoid or reject an absurd conclusion."

That language was used by this court in reversing a judgment against the accused, based upon a false construction of a statute far more susceptible of the reading given it by the inferior court than that given in this case to section 841 by the judges below. It does not defend, but destroys, the construction here applied. The appellate judge confounds "the legislative intent" with his own, and actually reverses the meaning of words in order to force the law to yield to his intent, and to what he thinks the law ought to be.

Though the appellate judge frequently uses *"may"* in the future sense, he seems at some pains to avoid the use of *"may come"*, but resorts to other rather strained expressions (R. 77, 78) to express his ideas. He bases his conclusion (R. 77-78) upon these grounds: (1) *Other sections* show that Congress did not intend to use *"may come"* literally—that is, in its usual, ordinary and popular sense, since it has no other—*but nothing whatever is said about "coming"* or *"into"* or *"shall"*; (2) the *object designed*—"a consideration of the mischief which the legislature sought to remedy", as it was expressed in *U. S.* v. *Harris,* 177 U. S. 305, 309—limits and controls the meaning of the terms and phrases used—that is, the intention is to be obtained from the supposed object designed, not the language of the statute, however plain it may be; (3) the *general intention* of Congress controls, not "its special intention manifested in the enactments", though such special intention was declared controlling in *U. S.* v. *Harris, supra;* (4) "it is inconceivable [*there is no reason*] that Congress intended to make a distinction" between persons and property that *may come,* and those that *had come,* into possession, or between property that *may come* or *coming,* and that which *had come,* into possession; (5) *there is no reason*—"no possible foundation in law or morals"—for such a distinction; (6) no court is justified in construing a statute prospectively and according to its plain terms, if a retrospective construction and a judicial re-editing and enlarging of it will hold the accused, though it contains an unmistakable expression of such prospective intent, and is wholly unambiguous; (7) no court is justified in adopting a construction that gives recognition to such a distinction if it would release the prisoner—let no accused man escape by holding that Congress means what it says.

The obsession of both judges is sharply shown by their opinions, which, reduced to the ultimate analysis, simply hold that Congress did not mean what it plainly said in section 841. In effect, they clearly concede that a strict construction excludes jurisdiction of this case. Every reason assigned by them for their judicial enlargement of this law has been so emphatically repudiated and denounced by this court, and all impartial judges, that it is difficult to speak in terms of moderation of their rulings.

In the leading case of *United States* v. *Wiltberger*, 5 Wheaton 76, the accused was convicted of manslaughter, under the 12th section of an act of Congress providing for the punishment of certain crimes against the United States. The 8th section of this act mentioned the high seas and a river, haven, basin or bay, but the 12th section mentioned the high seas only. The manslaughter charged in the indictment was committed by the accused on board of an American ship on a seaman belonging to said ship, whereof the defendant was master, in the River Tigris, in the Empire of China.

The jurisdiction of the trial court depended upon the place in which the crime was committed. This court held that the term "high seas" can never extend to a river in the interior of a country. The United States insisted on the jurisdiction of the trial court not so much on the extension of the words "high seas", as on that construction of the whole act which would engraft the words of the 8th section, descriptive of the place in which murder must be committed, on the 12th section which described the place in which manslaughter must be committed. To this contention, the court, by *Chief Justice Marshall,* replied as follows (pp. 94, 96):

> "This transfer of the words of one section to the other is, it has been contended, in pursuance of the obvious intent of the legislature. * * *
>
> "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial departmnet. It is the legislature, not the court, which is to define a crime, and ordain its punishment. * * *
>
> "The intention of the legislature is to be collected from the words they employ. Where there is no am-

> biguity in the words, there is no room for construction. The case must be a strong one indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated."

The court then examines the act in detail, applies these principles, and holds that the 12th section is to be construed according to its own terms, and that those of the 8th section cannot be engrafted on it, and concludes as follows (p. 105):

> "From this review of the examination made of the act at the bar, it appears that the argument chiefly relied on, to prove that the words of one section descriptive of the place ought to be incorporated into another, is the extreme improbability that Congress could have intended to make those differences with respect to place, which their words import. We admit that it is extremely improbable. But probability is not a guide which a court, in construing a penal statute, can safely take. We can conceive no reason why other crimes which are not comprehended in this act should not be punished. But Congress has not made them punishable, and this court cannot enlarge the statute."

The court was unanimously of the opinion, after giving the subject attentive consideration, that the offense charged in the indictment was not cognizable in the courts of the United States. This decision was rendered in 1820, and its principles have never been departed from by the Supreme Court, but, on the contrary, have been re-affirmed time and again.

The language of the *Wiltberger* opinion can be lifted and applied almost bodily to the statute in the present case, by simply reading person or property for place. To example:

> "If the words ['any * * * receiver * * * into whose possession money * * * or other property

* * * may come * * * shall be deemed guilty of embezzlement of the * * * money or other property so coming into his possession'] be taken according to the common understanding of mankind—if they be taken in their popular and received sense", they do not apply to persons or property that had come into possession before the law was passed. (p. 94).

"There is, too, in a penal statute, a difference between restraining general words and enlarging particular words". (p. 97).

"The crimes of [embezzlement of pre-acquired and after-acquired property] * * * , it has been truly said, are kindred crimes; and there is much reason for supposing that the legislature intended to make the same provision for the jurisdiction of its courts, as to the * * * [property of] which either might be committed." (p. 97).

"When the legislature is about to describe the * * * [property of which embezzlement by a receiver], cognizable in the courts of the United States [in the District of Columbia], may be committed, no reference whatever is made to a prior section respecting * * * [other species of embezzlement]; but the description is as full and ample as if the prior sections had not been in the act. This would rather justify the opinion, that in proceeding to * * * [embezzlement by fiduciaries], the legislature did not mean to refer us to the sections on * * * [embezzlements by other classes of persons and of other classes of property] for a description of the * * * [property of] which the crime might be committed, but did mean to give us a full description in the section [841] on that subject." (p. 98).

The prior sections of the code take up embezzlement by other persons and of other property, but omit the words *"may come"* and *"so coming into his possession"*, etc., used in section 841; except that section 833 applies only to property *"which shall come into his possession"*, and section 48 only to collateral which *"shall be deposited."* (p. 99).

"It has been argued, and, we admit, with great force, that in this section [841] the legislature intended to * * * [include persons and property that had come into possession before the act was passed or took ef-

> fect]; and it is almost impossible to believe that there could have been a deliberate intention to distinguish between the same offense committed * * * [by persons who may come and those who had come into possession, or of pre-acquired and after-acquired property]. Yet it would be carrying construction very far to strike out [or add to] those words ['may come' and 'coming']. Their whole effect is to limit the operation which the * * * [section] would have without them; and it is making very free with legislative language to declare them totally useless [to limit section 841], when they are sensible and are calculated to have a decided influence on the meaning of the * * * [section]". (p. 99).

It is again to be observed that in section 841 Congress makes no reference to previous sections or parts of the code for a description of the persons or property or possession required,—

> "but has inserted a description, and by so doing has materially varied the obvious sense of the section [from that of some prior sections]. * * * The probability is that the legislature designed to punish all persons [guilty of embezzlement of either pre-acquired or after-acquired property] * * * and such would have been the operation of the act had the words been omitted [and others used in their stead, or had others been added to those used in section 841]; but the legislature has chosen to describe the * * * [persons and property by whom and of which the offense must be committed], and has not referred to a description contained in any other [section or] part of the * * * [code]. The words are, * * * ['any * * * receiver * * * into whose possession money * * * or other property * * * may come * * * shall be deemed guilty of embezzlement of the * * * money or other property so coming into his possession']. The court cannot reject this description." (p. 101).

If we can supply the words *"might have come"*, or *"may have come"*, or *"come"*, or *"may be"*, or *"may have passed"*, or other words of retrospective effect, because such words appear in some other sections, we can also supply other words from other sections, and—

"probably defeat the will of the legislature. Yet if we depart from the description of * * * [persons and property] given in the section [841], in which Congress has obviously intended to describe * * * [them], for the purpose of annexing to the words * * * [of prospective effect actually used those of retrospective effect absolutely omitted in this section but] found [?] in * * * [some of the prior sections], there would be at least some reason in the argument which would require us also to annex to the words * * * [of this section the words * * * found in the * * * [prior] sections". (p. 102).

"But these words ['may come' and 'coming into his possession' etc.], are sensible and are material. They constitute the description of the * * * [persons and property] which the legislature has chosen to give us; and courts cannot safely vary that description without some sure guide to direct their way." (p. 102).

"The * * * section [841] takes up the crime of * * * [embezzlement by fiduciaries], which is not mentioned in the * * * [other sections]; and, without any reference to * * * [them], describes the * * * [persons and property by whom and of] which it must be committed, in order to give jurisdiction to the courts of the United States [in the District of Columbia]. That * * * [property is and those persons are only such as 'may come * * * so coming into * * * possession']. There is nothing in this section [841] which can authorize the court to take jurisdiction of * * * [embezzlement by a receiver into whose possession the property had come before the law]". (p. 103).

"The legislature annexes to the offense a description of the * * * [persons or property by whom and of] which it must be committed in order to give the court jurisdiction. * * * Congress has annexed a description of * * * [persons and property]. * * * The conclusion seems irresistible, that Congress has not in this section [841] inserted the limitation of * * * [persons and property] inadvertently; and the distinction which the legislature has taken [between persons and property that 'may come', and those that might have come, into possession] must, of course, be respected by the court. * * * The description of the * * * [persons and property] is complete in itself, and [section 841] makes no reference to the de-

> scription of * * * [persons or property] in the others." (p. 104).

Attention is also called to the fact that all of the other sections of the code relating to the various phases of embezzlement, including section 841, describe the property and time of possession required "without any reference to a preceding section." (p. 104).

> "This characteristic feature of the law now to be expounded, deserves great consideration, and affords a powerful reason for restraining the court from annexing to the description contained in one section, parts of the description contained in another." (p. 105).

"This characteristic feature" also proved controlling in the construction of the statutes involved in *French* v. *Spencer*, 21 How. 228, 238, and in *Hamilton* v. *Rathbone, infra.*

In *Hamilton* v. *Rathbone*, 175 U. S. 414, the court construed section 728 *R. S. D. C.*, which gave to a married woman the right "to devise and bequeath her property". This section was drawn from a prior act which limited her right to devise and bequeath, to such property as she had not acquired by gift or conveyance from her husband. The Court of Appeals of the District of Columbia held section 728 limited as the original act, and reached this conclusion by ignoring the plain terms of the section standing alone, and recurring to the original act in order to create an ambiguity which did not exist on the face of the section; and so cut down the real meaning of the words "her property" to read as if the words "not acquired by gift or conveyance from her husband" had been added to or engrafted on the section. This court reversed, and said (p. 419):

> "But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it."

The court says that this rule has been repeatedly applied in the construction of the various sections of the U. S. Revised Statutes, and cites some of the cases so holding (pp. 419-421), and proceeds (p. 421):

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended re-

> view of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity. If section 728 were an original act, there would be no room for construction. It is only by calling in the aid of a prior act that it becomes possible to throw a doubt upon its proper construction."

Neither judge below finds any ambiguity whatever in section 841 for that is impossible; but because the act does not comport with their ideas of what it ought to be (and must be to fit this case), they arbitrarily hold that its words mean the reverse of their established sense. The trial judge (as we have seen) relies chiefly upon the *"no reason"* argument. The appellate judge does the same, but in addition he gratuitously assumes (R. 77) that the different words of some prior sections are retrospective (though they are most likely prospective, while others are exclusively so), and then proceeds to engraft such retrospective words on to section 841; and this he complacently calls construction.

In *Burton* v. *U. S.*, 202 U. S. 344, it was said (pp. 377, 391, 400):

> "It is the legislature, not the court, which is to define a crime and ordain its punishment.
>
> * * * * * * * * * * * *
>
> "Unless the statute by clear intendment includes the transaction, any extension beyond its meaning would be, under the elementary rule governing the interpretation of criminal statutes, simply judicial legislation, as it would be by judicial construction making that a crime which Congress has not so made, and thereupon imposing punishment. * * * It seems clear to my mind that the construction now given writes into the statute an offense which Congress never placed there. It is a criminal case, and, in such a case above all, judicial legislation is to be deprecated."

In *Mackey* v. *Miller*, 126 Fed. Rep. 161, 163 (C. C. A.), the accused were convicted by a judicial enlargement of the language of *R. S. U. S.* Sec. 5447, on the theory that they were within the general intention of the act. They were charged with resisting an Indian agent, and using a deadly weapon against him while he was searching for liquors on a reservation. The law relates to assault-

ing, resisting, etc., any officer of the customs or his deputies, or any person authorized "by this act" to make seraches, etc. It further provides that if a deadly weapon be used, the offender shall be deemed gulity of felony. After their conviction, the accused sued out *habeas corpus*, on the ground that the trial court was absolutely without jurisdiction, because the law did not apply to or include an Indian agent. The writ was dismissed by the Circuit Court; but on appeal to the Circuit Court of Appeals for the Ninth Circuit, this judgment was reversed and the accused were discharged from custody, on the ground stated.

In *McCarthy* vs. *McCarthy*, 20 App. D. C. 195, 202, 203, the court construed a section of the code relating to married woman, and said:

> "Where the legislature makes a plain provision in regard to any subject matter, the courts are not at liberty to add to or extend that provision beyond the plain import of the words employed. *Shaw* vs. *Railroad Co.*, 101 U. S. 557. • • • The Act of Congress is expressed in plain terms, and leaves no room for conjecture. In such case the rule is imperative, and cannot be departed from without assuming on the part of the judicial tribunals legislative powers. *French* vs. *Spencer*, 21 How. 228, 238."

In *Clark* vs. *U. S.*, 19 App. D. C. 295, 309, the court *(per* Shepard J.), in construing a section of the code (jury law), said:

> "The situation, however, will not justify us in reading such a provision into one of the saving clauses, or into one of the exceptions from the general repeal of former laws. There is no ambiguity in the provisions referred to that calls for interpretation, in the course of which an exception might be raised by construction to prevent a result which, had the legislative attention been directed to it, would undoubtedly have been guarded against. Courts cannot be justified in adding a provision to a statute under the guise of construction."

In *Bank* v. *Berlin*, 26 App. D. C. 218, 220, *supra*, *(per* Shepard, Ch. J.,) it was most emphatically held that section 1214 of the code relating to liens of judgments "from the date when the same *shall*

be rendered" does not include a judgment rendered after the code was passed but before it took effect, but only future judgments. We have already quoted from this case at some length. The reasons given for that decision destroy those assigned for that in the case at bar. Both cannot be right. That is. This is not.

If a different rule applies to this case than to those quoted, we frankly confess our inability to understand the reason why. The only distinction is that they involve civil statutes and a few dollars, while this involves a drastic penal act and a large pecuniary forfeiture.

We can cite no less than twenty other decisions of the Court of Appeals, construing various sections of the code, to show conclusively that if section 841 had been a purely remedial statute, that court would have held it not to include persons and property that had come into possession before the code, or to forfeit vested rights or claims to commissions, costs and charges. It is absolutely impossible to reconcile those decisions with this, though nearly all were civil cases.

If there really be any doubt or ambiguity about section 841, it is not to be resolved against the accused, though the judges below do neither recognize nor apply this rule in criminal cases; but they have given it effect in a civil case involving the construction of a taxing statute. *Wash. Transportation Co.* v. *D. C.*, 19 App. D. C. 462, 470.

The well-established rule is that if a penal statute be ambiguous, the courts will lean to that construction which favors the accused. *Hackfeld* vs. *U. S.*, 197 U. S. 442, 450. *Bolles* v. *Outing Co.*, 175 U. S. 262, 265. *Ex. p. Baily*, 39 Fla. 734, 743. *U. S.* v. *Wigglesworth*, 2 Story 369, 374. *State* v. *Myers*, 56 Ohio St. 340, 349, 350. *Matheson* v. *U. S.*, 71 Fed. Rep. 394, 396 (C. C. A.). *Hartranft* v. *Wiegmann*, 121 U. S. 609, 616. *Twine Co.* v. *Worthington*, 141 U S. 466, 474. *Baldwin* v. *Franks*, 120 U. S. 678, 691, 692. *Rice* v. *U. S.*, 53 Fed. Rep. 910, 912 (C. C. A.).

What is doubtful or ambiguous about section 841? What language renders it uncertain? What gives a court any right to construe it, insteading of simply following and enforcing it? What warrants the judges below in substituting their conjectures for the plain meaning of this law? Where is there any room for construction? What right had they to depart from the clear sense of this

act standing alone, and resort to reasons entirely *dehors* section 841 in order to create an ambiguity in it? How can they substitute their will for the legislative will? How can they enlarge the language of this law as they see fit?

Can a man be convicted of horse-stealing under a statute against hog-stealing? Or of the larceny of a white horse for a black horse? Of a diamond for a dog? Of a hat for a harness? Of pre-acquired for after-acquired property? Of larceny on the high seas for larceny on land? Of carrying tickets for a lottery that has been drawn for one to be drawn? Of importing lager beer for spirituous liquor or wine Is one liable as a receiver under a statute against a company?

In this case, the judges below have simply obliterated Congress, and made their courts supreme, as the law-making power; and their courts, after all, merely reflect and enforce their individual will in this case, and not the legislative will which section 841 so plainly declares for all cases.

In *Webber* v. *St. Paul*, 97 Fed. Rep. 140 (C. C. A.), the court well said (p. 144):

> "Whatever the result of such an investigation [of the common law], that law [the Minn. statute] must still prevail, and it is too plain to be construed away. When the language of a statute is unambiguous, and its meaning is clear, arguments by analogy or from history and attempted judicial construction serve only to create doubt and confuse the judgment. They serve to obscure far more than to elucidate the meaning of the law. There is no safer or better canon of interpretation than that, when the terms of a statute are plain and its meaning clear, the legislature must be presumed to have meant what it expressed, and there is no room for construction."

To the same effect: *Johnson* v. *Ry. Co.*, 117 Fed Rep. 462, 465, 467, 469 (C. C. A.). *Swartz* v. *Siegel*, 117 Fed. Rep. 13, 18-19 (C. C. A.). *In re Schilling*, 53 Fed. Rep. 81, 83 (C. C. A.).

The courts below merely created confusion by their attempts to construe this law. Simply take it as it reads, and there is no doubt or difficulty whatever as to the persons and property and possession and acts that it includes; but if there be any ambiguity, it must be

resolved in favor of the accused, as we have said. The elementary rules of statutory construction have been wholly ignored by the judges below. They have applied the civil rule of liberal construction to a penal act. The appellate judge swiftly passes the cases declaring the imperative rules of construction of statutes, and especially penal statutes, with the single remark (R. 77) that none of them "covers the particular phase of statutory construction here presented." If by "covers" he means "supports", the statement is true; for all of them most emphatically denounce both the construction and method of construction applied by him. We have again laboriously presented them herein as absolutely controlling in this case, and in order that this court may judge the correctness or error of his remark.

To contend that *"may come"* and *"coming"* are prospective only, is to argue a self-evident, axiomatic proposition; yet in this case there is neither allegation nor proof that the defendants received any money or property whatever after the code took effect. Section 841 simply has no application at all to the instant case. It is for Congress, not the court, to supply the hiatus which so clearly exists between (1) pre-acquired property and pre-possessed receivers, and (2) after-acquired property and after-possessed receivers, under this law.

Since the decision in 1896, in *Chapman* v. *U. S.*, 164 U. S. 436, 446, holding that this court has no jurisdiction on error of a judgment of the Court of Appeals of the District of Columbia in a case involving merely the issue of guilt or innocence of crime, that court has not disturbed judgments against the accused so as to be noticeable; but judgments in favor of the accused have (in comparison) frequently been reversed under section 935 of the D. C. Code, which provides that "in all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given the defendant, including the right to a bill of exceptions." Reversible errors appear most common in civil cases, but practically impossible in criminal cases if the judgment is against the accused.

It is true that to err is human—sometimes; but it is equally true that it is often inhuman. *Neither of the judges below has given or been able to give any good reason whatever* for his alleged construction of section 841; and we have sought in vain to find any warrant

or excuse in law, language or logic, for their conclusions. It is a plain case of judge-made law. Yet they have committed far more serious errors in this case.

In *Ex p. Kearney*, 55 Cal. 212 (1880), the court said (p. 223):

> "But it is only when an offence particularly aggravating against morals or justice has been committed, that a temptation arises to distort the law, to expand the meaning of words beyond their plain purport, to give to a penal statute an effect not intended by those who framed it nor required by its language, that we may bring within its scope, and subject to condign punishment, those whom we believe deserve the severest penalties. At such times, if ever, we forget that the worst as well as the best of men is entitled to the protection of the Constitution, and that a strained interpretation of the law which deprives a bad man of his right to personal liberty today, may tomorrow deprive a good man of his equally sacred—in the eyes of some of us perhaps more sacred—rights of property."

II. COMMISSION AND LETTERS ROGATORY.

(1) Our demurrer (R. 2-4) was overruled (R. 4-5) as to four counts on Friday, April 28, 1905; whereupon we gave notice in open court that we should apply to the Court of Appeals for a special appeal on the reconvening of that court on Tuesday, May 2, 1905, on which date a petition for such appeal was presented, but was denied later in the same day (R. 11). On the next day, May 3, 1905, we filed our motion (R. 5) and affidavit (R. 5-6) for (1) a commission under Code Sec. 922 to take the depositions, on written interrogatories, of our material non-resident witnesses Gilbert and Hotchkiss, in New York city, and for (2) letters rogatory under Code Sec. 1058 to take the deposition of our material foreign witness Miller, in London, England; reciting that said persons are material witnesses for us. The affidavit (R. 5-6) states briefly and concisely the facts which "this defendant will prove" by each of the said witnesses, and certain other pertinent matters. This motion was heard on one day's notice (R. 6), and on Thursday, May 4, 1905, *was granted* (R. 7). On May 5, 1905, our interrogatories (R. 11) to each of said witnesses were filed and served.

They appear in full in the transcript (R. 72, items 9-11), but were not printed because we thought it unnecessary (R. 74). No cross-interrogatories were ever filed; no commission or letters rogatory were ever issued; but nevertheless on Monday, May 8, 1905, shortly after 10 o'clock a. m., we were forced into trial against our earnest protests. Between the time when the order was passed and such trial begun there intervened one Saturday half-holiday and one Sunday. Thus the order was effectually nullified and killed, and all our time and labor and the proceedings relating to it were wasted and useless. We were entitled to this order as a matter of right, and not of discretion or favor; and we were likewise entitled to a reasonable time to execute the order and get the benefit of it. The commission and letters rogatory are compulsory process within the meaning of the Sixth Amendment. We should have been better off if the court had frankly denied our motion instead of having granted it and then surprised us by a sudden and unexpected refusal to give us any time to execute the process ordered. Sec. 922 provides in criminal cases that "if a material witness for the defendant resides beyond the District of Columbia * * * the defendant may apply in writing to the court for a commission to examine such witness upon interrogatories thereto annexed when the deposition is to be taken beyond the District of Columbia, * * * and the court may grant the same," etc. The law also provides for notice to the U. S. attorney, for cross-interrogatories within a definite time to be fixed, for oral examination if good cause be shown, for the issuance and return of the commission as in civil cases, etc. Sec. 1058 provides that "when the testimony of any witness residing in any place not within the sovereignty of the United States is desired in any cause pending in any court of the District of Columbia, the same may be taken upon interrogatories and cross-interrogatories filed in said court, and transmitted by said court under lettere rogatory, addressed to some court of record in the foreign State in which said witness is then to be found."

(2) The Sixth Amendment provides that "in all criminal prosecutions the accused, shall enjoy the right * * * to have compulsory process for obtaining witnesses in his favor." The Constitution is to be construed liberally in favor of the rights of the accused. *Ex p. Lange*, 18 Wall. 163, 178. Secs. 922 and 1058 were made in pursuance of this provision. "May grant" in section 922, and "may

be taken", in section 1058, are not permissive, but mandatory. The general rule is that "may" in a statute is mandatory where the public or third persons have a claim *de jure* that the power given by the statute be exercised. These sections were enacted exclusively for the purpose of creating an absolute right in and for the benefit of the accused in criminal cases, and were not intended only to confer a mere discretion on the court. The court must grant the order on proper application, such as was made in this case.

In *Rock Island* vs. *U. S.*, 4 Wall. 435, when passing on a statute reading, "The Board of Supervisors of counties under township organization, in such counties as may be owing debts which their current revenue, under existing laws, is not sufficient to pay, may, if deemed advisable, levy a special tax", this court said (pp. 446-447):

> "The conclusion to be deduced from the authorities is, that where power is given to public officers, as in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid and who would otherwise be remediless. In all such cases, it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose an absolute duty."

In *State* v. *Rodgers*, 32 Ark. 462, 464, under a statute quite similar to Code D. C. Sec. 922, providing that the court "may authorize" the taking of depositions of non-resident witnesses for the accused, in criminal cases, it was held that the court with without discretion to refuse the order; and the trial court was compelled by *mandamus* to order the commission to issue. In a vigorous opinion in *U. S.* v. *Wilder*, 4 Woods, 475, 476, the court held that the commission must issue in criminal cases under the federal statutes, though no express provision for such cases is made thereby. *In re Carter*, 3 Ore. 293, 296, under a statute providing for commission, it was held that "may, in his discretion", is permissive, but "may" is mandatory.

That sections 922 and 1058 are mandatory is also shown by their comparison with other like provisions of the code and rules, viz.: Sec.922, "may grant". Sec. 1058, "may be taken". Sec. 1060, "may order". Sec. 26, "may * * * appoint an examiner * * * to whom he shall issue a commission." Sec. 1061, "may be taken * * * provided the court may, in its discretion." Common Law Rule 115, "may appoint an examiner" (by C. L. Rule 111 all C. L. Rules govern criminal cases as far as applicable). Eq. Rule 65, "may * * * appoint an examiner". Eq. Rule 68, "shall * * * issue a commission". In *Wallace* v. *American Linen Co.*, 2 Thomp. & C. (N. Y.) 574, it was held that an order refusing a commission to take depositions of non-resident witnesses, affects a substantial right and is appealable.

(3) The order granting the motion for a commission and for letters rogatory was, in effect, a decision that *the witnesses were material*, as code section 922, under which the order for the commission was granted, provides that "if a material witness for the defendant resides beyond the District of Columbia * * * the court may grant" a commission to take the deposition, etc. The court cannot grant a commission to take a deposition of an immaterial non-resident witness. The intense materiality of the desired evidence was sharply shown by the recent trial, and especially the result. To the non-ownership of the W. B. E. A., etc., the evidence of Hotchkiss and Gilbert was highly important. That Miller's evidence was especially material was also shown by the court's ruling (R. 55-56) on Mead's evidence of the very same character, which was distinctly held material over specific objection thereto and motion to strike out, interposed by the Government (R. 56).

It seems very strange that when the law gave the defendant the absolute right to the commission and letters rogatory and the evidence sought thereby, the court could nullify this right by putting him on trial before, by any human possibility, he could get any benefit whatever from them.

In *Symes* vs. *Irvine*, 2 Dall, 383, 384, it was held that the court will not, in every case, require the party applying for a continuance to get the testimony of non-resident witnesses, to disclose the matters of fact to which such witnesses are expected to testify. Here, however, we have fully made such disclosure in our motion (R. 5) and affidavit (R. 5-6) for the commission and letters rogatory,

and in our affidavit (R. 10-16) for continuance, and by our interrogatories.

(4) Our application complied strictly with the law. As the court had no power to refuse the order directly, it could not do so indirectly by denying us the time necessary. This subject is made a material part of our motion and affidavit for continuance (R. 11-14, 15-16), and is covered by our exception (Ex. 3, R. 29) to the denial of that motion, and specifically by some of our other exceptions (Ex. 4, R. 29, Ex. 30, R. 56-57).

We had an absolute right to stand on the order, which was far more efficacious to us than the mere personal presence of the New York witnesses by summary process, on account of the documentary evidence sought, which it would require a reasonable time for them to produce. It was their evidence, not their presence, that we wanted; for without the documentary evidence called for by the interrogatories, their testimony would be greatly impaired, if not entirely useless. The order could not be avoided, and the error cured, by a mere offer (R. 29) of an order for summary process to bring those witnesses here, made on the very eve of a forced trial; nor could such process reach Miller, in London, England; nor did the court include him in the *post-obiter dicta* about process for our non-resident witnesses (R. 56-57). We do not suppose that the trial judge intended that the summary process of his court should run into, or be compulsory on Miller in, England; but he seemed to have overlooked this in ruling on our motion (R. 29) for time to execute the order for the commission and letters (R. 29, Ex. 4).

At no time did we abandon our right to the commission and letters rogatory or either of them, or to reasonable time to execute them; but, on the contrary, just before the jury was empaneled and sworn (R. 29), we again asked for the necessary time (R. 29), which the court again denied us (Ex. 4, R. 29); and at the close of all the evidence in the case we (R. 56-57) "moved the court to withdraw a juror and discharge the jury from further consideration of the case, because the Government had not crossed the defendant's interrogatories to his New York and London witnesses, which he had filed May 6 [5[, 1905, and because, in view of the fact, the defendant was unable to proceed further with his case." This motion was overruled (Ex. 30, R. 56-57).

We were entitled absolutely to reasonable time to prepare our

defense. This rule applies to all crimes, however heinous. We must have compulsory process for our witnesses, with reasonable time and opportunity to obtain the benefit of the same. Having been absolutely denied the benefit of our defense, the appellate will reverse for this reason alone.

"Compulsory process", in the federal Constitution, is to be read in a broad sense.

Nothing can justify or excuse a court in forcing the accused to trial at such time or in such manner as will deprive him of, or impair, any of his constitutional rights. His right to compulsory process for his witnesses must not be trifled with nor made a dead letter. He must be accorded all reasonable facilities in the preparation of his defense. It was grave error to deprive us of all benefit of our application and order for the commission and letters rogatory.

By giving the accused the right to have compulsory process for witnesses in his favor, the Constitution guaranteed a right of substance, not of form. The substantial thing is the evidence of the witnesses. Their mere personal presence is simply a means to the end sought. To give the accused compulsory process for the presence of his witnesses, summarily and without time to get the documents required of them, is idle form; for his witnesses who are unable to testify according to the rules of evidence without certain documents, and without a little time to enable them to get the required documents and to speak intelligently as to the facts sought to be proved by them, are not the witnesses in his favor guaranteed by the Sixth Amendment. A commission, under the federal laws, is mandatory on the receiving court, and that court is bound to issue its compulsory process for the witnesses named, on demand. The commission itself, then, is compulsory process with the required aid or intervention of the receiving court, but a step removed from process for a local witness. The letters rogatory are the same, if the foreign court acts on them; for its compulsory process then goes for the witnesses named. So that, either under commission or letters rogatory, so far as the witnesses are concerned, they attend and testify under compulsory process in the full meaning of the term.

(5) The order for process (R. 7) for our New York witnesses was interlined in the minute record of the order for commission (R. 7) long after the trial had closed. It was first found by us on Decem-

ber 7, 1905. At the close of all the evidence, speaking of such an order, Mr. Baker said to the court (R. 57): "There was no order made of record. I examined the record, and found no such order." Assuming as true the recital of the bill of exceptions (R. 29) that "the court tendered to the defendant compulsory process to secure the attendance of said witnesses [one of whom was in London, England]; of which the defendant declined to avail himself"; why should such an order appear in the minutes at all? Is it sufficient to offset the effect of overriding the order for the commission and letters rogatory?

It was unwarranted to assume that the accused had no good defense, in the face of his direct and uncontradicted affidavit (R. 10-16, 14) to the contrary. The best of defenses is easily cut off by refusing time and facilities to prepare it properly, and opportunity and assistance of counsel and witnesses to present it properly. There was no possible or conceivable harm or injury that could be done to anyone by granting the accused a little time to prepare for trial and to get the benefit of the order for the commission and letters rogatory; yet this was denied him (R. 29, Ex. 4).

(6) If the right to the commission and letters rogatory as matter of discretion and not of right, then there was an abuse of discretion by the trial court in denying us the necessary time to execute them; and such abuse of discretion may be corrected on appeal, by analogy to the right to rview orders denying bills of particulars and continuances, especially when the point is saved by specific objections and exceptions (Ex. 4, R. 29, Ex. 30, R. 56-57), as it is in this record. It may be safely stated that any matter resting in the sound discretion of the trial court may be reviewed on appeal whenever there has been (1) a refusal to exercise such discretion or (2) an abuse of such discretion.

(7) The accused was put on trial about one month after indictment, but judgment (R. 26) was not entered until two and one-half months after verdict; we waived the 38 days after judgment allowed us by Rule 55 of the trial court to present our bill of exceptions, and presented it instanter on the rendition of judgment (R. 27); the bill was not signed (R. 71) until about three and one-half months after it was presented; and we were unable to get our transcript of record out of the trial court until one month thereafter (R. 73). If a small part of the seven months after verdict had been

added to the one month before, we should have been prepared for trial and should not be here. *All cause for haste vanished with the verdict.* There has never been one moment's delay or laches on our part, from the beginning to the end of this case; but, on the contrary, the record shows our exceptional diligence at all times and in every respect.

This case was docketed in the Court of Appeals on December 8, 1905 (R. 74). We were ready to argue it in January, 1906, but the government counsel then asked the court to pass it until February, and then again until March, when it was argued and submitted (R. 75). It was decided by the appellate judge on May 1, 1906 (R. 75, 85), and our motion for a rehearing was denied on June 13, 1906 (R. 85), and our petition for a writ of error to this court was submitted and overruled on the same date (R. 85-86).

The allowance of reasonable time and facilities to the accused and his counsel to prepare for trial, would certainly have resulted in the same verdict that was rendered a few months later on his co-receiver's trial—not guilty.

The appellate judge, in holding (R. 78-80) that we were not entitled to a continuance, disposes of our order for commission and letters rogatory by saying that the evidence sought under the commission was incompetent (R. 79), and that under the letters rogatory "does not show a good defense" (R. 80), etc. We shall therefore recur to this subject *infra* in considering our motion for a continuance, and try to show that he is again in error.

The trial judge gave no reason whatever for his astounding action in forcing the accused to trial on Monday morning, in the face of his own solemn order for the commission and letters rogatory of the previous Thursday. He did not even vacate that order. It is difficult to characterize his action in seemly terms, and we therefore refrain from the attempt.

III. INSPECTION OF PAPERS IN EQ. 15907.

(1) About two months before the alleged trial of this cause, there were removed from the office of the clerk of court to the office of the District Attorney all of the original papers and records in Equity No. 15907, mentioned in the indictment, and kept by the

last-named official in his office up to and during the trial (R. 9, 14-15, 17, 22-26,, 28-29). On Thursday, May 4, 1905, we filed our motion and affidavit (R. 9) for an order requiring him to return and restore forthwith to the clerk's office all of these papers and records, for it was highly necessary that we should have access to, and be permitted freely to examine and inspect them in order to prepare properly for trial; but our motion was denied on May 8, 1905 (R. 17), and we excepted (R. 28-29, Ex. 1). After our motion was filed the prosecutor invited us to examine the papers in his office (R. 28). This was on Thursday; so that it gave us only seven hours on Friday and three on Saturday—ten hours in all—to examine "a two-bushel box" of them (R. 25) or "a bushel-basket of them" (R. 29) before the trial began. The trial court's reasons (R. 29) for denying our motion find no support in the law of inspection of public records. This subject is referred to in our affidavit for continuance (R.14-15), which recites "that it is essential that affiant's counsel shall fully understand the details of all the said proceedings; that the U. S. Attorney has had all of the material papers and records in the said Equity Cause No. 15907 in his exclusive possession in his office ever since the said indictment was returned, if not longer; that affiant and his counsel cannot properly prepare for trial without opportunity freely to inspect and examine the said papers and records, * * * which opportunity they have not had;" and this recital is supported by the affidavits (R. 16, 23-24) of the counsel, Messrs. Baker and Walker. The subject is also mentioned in our motion and affidavits (R. 21-24) for new trial, the accused's affidavit (R. 22-23) reciting that we had no reasonable time or opportunity to examine any of said papers before or during the trial, except during the trial only those which were identified and those which were offered in evidence, all of said papers in Eq. 15907 other than those put in evidence having been kept in his own close custody by the U. S. Attorney, and daily brought to the trial court from and returned to his office at the opening and adjourning of the court during the trial. This recital is supported by Mr. Walker's affidavit (R. 23), who also says that "he had no reasonable time or opportunity to study this cause, or to examine any of the papers in said equity cause prior to or during the trial;" and by Mr. Baker's affidavit (R. 24), who says that he "had no reasonable time or opportunity to examine any of the papers in Equity Cause No. 15907 before or

during the trial"; that he was not connected with said cause "in any manner, and knows but very little about it, and most of that he learned during the trial of this case." None of the facts upon which we based our motion for inspection was directly denied; and it requires no argument to show how vital to us was the inspection of said papers before trial. We had an absolute right to inspect them where they lawfully belonged—in the clerk's office and custody—both by statute and common law; and it was reversible error to deny our motion. These papers were public records having reference and relating to real and personal property in the District of Columbia.

(2) "All public records which have reference to or in any way relate to real or personal property in the District of Columbia, whether the same be in the office of the recorder of deeds or in some other public office in the District of Columbia, shall be open to the public for inspection free of charge." *Code D. C.* Sec. 556.

"Whosoever maliciously or with intent to injure or defraud any other person defaces, mutilates, destroys, abstracts, or conceals the whole or any part of any record authorized by law to be made, or pertaining to any court or public office in the District, or any paper duly filed in such court or office," shall be fined or imprisoned or both. *Code D. C.* Sec. 844.

These sections settle our statutory right; and the cases establishing our common law right are collated in 24 *Ency. Law* 182-184.

Rule 104 of the trial court (which applies to the criminal courts by Rule 111) provides:

"The clerk *shall not* hereafter [1898] allow any original papers in any cause, at law or in equity, to be taken out of his custody, except by the auditor or an examiner of the court, as hereinafter provided."

No exception is made as to the U. S. Attorney.

(3) The code, the common law, and the court rules require that court papers shall not be removed from the clerk's office or custody; otherwise the right of free inspection would be nullified, as it effectually was in this case. The inspection of public records provided for means free inspection in the lawful place of custody, and not embarrassed inspection in some other place to which they have been unlawfully removed and held in close custody by some unauthorized

person, who had no right either to abstract or to conceal them. The U. S. Attorney had no right to be present, in person or by assistant or other representative, at any conference between the accused and his counsel, nor at any inspection of said papers by them, nor to require them to inform him by word or act as to what of said papers they desired especially to see, nor to compel them, either directly or indirectly, to disclose to him the defense, or any part of or clue to it; nor had the court any power so to do. The law of inspection of public records emphatically forbids what was done by the prosecutor in this case; we were seriously injured by it; and the court finally shut us off from our right of inspection by denying (R. 17) our motion (R. 28, Ex. 1), and in this committed grave error.

> "The accused, however, must be accorded all reasonable facilities in the preparation of his defense," 9 *Cyc.* 172.

The rule as to ordering documentary evidence into the clerk's custody does not apply to "any document or other writing required by law to be kept in the custody of some particular person". *Bass vs. U. S.* 20 App. D. C. 232, 245. Here we could not even have ordered into the clerk's custody the papers which the law required to be kept in his custody. This was a fatal error; and neither the affidavit of Mr. Beach (R. 17) nor that of Mr. Smith (R. 25-26) presents any good reason for their acts or the court's ruling in the premises. The record clearly shows how seriously and unjustifiably the accused was hurt in this respect. The trial began (R. 29-30) within a few moments after our motion was denied; and we were thus refused any time or opportunity to get the benefit of even what the court offered us in its ruling (R. 29). "The U. S. Attorney states that he needs the papers in evidence" (R. 28) · but the court ruled out a record from the recorder's office (R. 42) "on the ground that it is against public policy to remove public records from their place of lawful custody, for the purpose of using them as evidence."

(4) If these papers were needed in the District Attorney's office in preparing the case for trial (R. 17, 78), were they not at least equally required by the accused and his counsel? The statement of the prosecutor (R. 17) that "some of the papers had been lost or abstracted when they were in the file room of the court", to which the appellate judge refers (R. 78), was made in the presence

of the jurors who were a few moments later empaneled and sworn in this case, and it insinuated that the accused was responsible for such loss or abstraction. The facts are these: (*a*) In the latter part of the year 1900 a stranger called at the clerk's office, and asked to see the auditor's report of July 31, 1900 (R. 35-36), and it was handtd to him by Mr. Meigs, an assistant clerk. It has not been seen since; but immediately upon learning of its loss, the plaintiff in error furnished the clerk's office with a complete copy of it, which he had previously obtained from the auditor, and this copy has ever since taken the place of the original. (*b*) In May, 1904, it was discovered that the receivers' certificates of deposit (R. 38) were missing from the files; but a little later they were found in the office of Mr. Edwards, one of the solicitors in the equity case, and returned to the clerk's office by his executor. No others of said papers have ever been lost or abstracted, and the innunendo against the accused was utterly baseless.

We were denied access to said papers, and were not afforded any facilities for examining them. The trial judge (R. 28-29) gave us no time whatever to inspect them, and thus nullified what he offered (R. 29) us. He also says that his "desire is not to subject the papers to loss" (R. 29)—another gratuitous slap at the accused in the presence of the panel of jurors. For similar remarks of the prosecutor and judge reflecting upon the accused and his counsel, on a motion for continuance, in the presence of the jurors soon afterwards sworn in the case, a conviction was reversed in *Allen* v. *U. S.*, 115 Fed. Rep. 3, 9-10 (C. C. A.), in a vigorous opinion.

Among these removed papers and records were the many orders which the equity court had passed from time to time, during the eleven years of the receivership, directing the receivers to pay or invest; and all of the disbursements made by the receivers under these orders were received (R. 38-41) as evidence of their embezzlement by the accused, as we have said, and he was left utterly helpless; yet the appellate judge says (R. 78) that " it nowhere appears that the defendant suffered any detriment by the denial of his motion."

We submit that there was a gross abuse of discretion by the trial judge in denying the accused the inspection of the said equity papers and records, even conceding that it was a matter of discretion, which it was not.

IV. BILL OF PARTICULARS.

(1) The indictment (R. 1-2) is general only, and does not give the accused any information whatever as to the items, acts, or transactions which the prosecution intended to prove on the trial to support it. The offense is a single act crime, and does not rest upon a course of conduct. The accused is entitled to be informed of the nature and cause of the accusation against him; and whenever a general indictment is good as a pleading, the accused is entitled to demand a bill of particulars specifying the details of the general charge against him. In this case there were no preliminary proceedings of any kind from which we could learn any of these details. On Thursday, May 4, 1905, we therefore filed our motion and affidavit (R. 7-8) for a bill of particulars of acts and evidence, which came on for hearing (R 17, 29) on Monday, May 8, 1905, at 10 o'clock a. m. (R. 28), to which the prosecutor objected for want of two clear days' notice; "but the court requested to hear the point of the motion, and after hearing the said motion read and argued, declined to grant it, because the court concluded that it was without merit; and then the said objection was by the court sustained; to which ruling of the court the defendant duly noted his Exception 2" (R. 29). How intensely this ruling injured us is plain from this record, especially as to the alleged acts of embezzlement (*infra*, Conversion). By all of the authorities, our motion should have been granted; but, as a matter of fact, it was overruled (R. 17).

(2) Where it is permissible to allege the offense of embezzlement in general terms, a bill of particulars should be furnished the accused on motion therefor. 15 *Cyc.* 513, 519. It "should ordinarily be granted wherever the accused is liable to be surprised by evidence for which he is unprepared". *McKnight* v. *U. S.*, 97 Fed. 308, 213 (C. C. A.; embezzlement; some particulars alleged; the motion sought the further particulars of the alleged conversion). In a criminal case a bill of particulars is required whenever the indictment fails to give notice of the special matter intended to be proved. *Williams* v. *Com.*, 91 Pa. St. 493, 502 (perjury).

> "The order should never be refused where the court can see any reason to believe such particulars necessary to inform the defendant of the particular transactions, or instances of embezzlement, intended to be proved

against him, so as to enable him to meet them." *People* vs. *McKinney*, 10 Mich. 54, 92.

"There should always be such certainty as the nature of the case permits, in order that the defendant may have reasonable opportunity to be prepared with his defense; and where the allegations of the plaintiff are general and vague, and it is reasonable to presume that he could be more precise in his statements, an order for a bill of particulars ought to be granted, if demand be made in good season." *Vansant* vs. *Lindsley*, 2 App. D. C. 421, 423 *(crim. con.)*.

"It seems to be well established that in cases of this and kindred character, the trial court may, on motion of the defendant, require the prosecution to file a bill of particulars informing the defendant with more certainty than is found in the information, in respect of the times, places and circumstances of his offense. * * * And it would seem to follow that specifications ought to be ordered in all cases where it may be made to appear that the nature and circumstances of the offense charged reasonably admit of more definite assignment; and also, that the defendant may be embarassed and prejudiced by reason of the unnecessary generality of the charge against him." *Lauer* vs. *D. C.*, 11 App. D. C. 453, 454.

This case also notes the distinction between a single act offense and one consisting of a course of conduct, the former requiring the bill but the latter not always. An indictment in general terms, and without any particulars of the alleged offense, or specific acts which the prosecution will offer in evidence as the essential facts of the offense charged, depends for its constitutional validity upon the power and duty of the court on motion to order a bill of particulars to the accused, as in all criminal prosecutions he has the constitutional right to demand that he be informed of the nature and cause of the accusation against him. *Com.* v. *Bennett*, 118 Mass. 443, 452. *Com.* v. *Wood*, 4 Gray, 11, 13. *State* v. *Rowe*, 43 Vt. 265, 267. *Thalheim* v. *State*, 38 Fla. 169, 178-182.

"What information does the indictment convey? * * * I certainly do say that the prosecutor, in a case of embezzlement, ought, in justice to the prisoner, to give him much more information than the indictment

contains. * * * If the necessary information be refused, I will * * * grant an order, and put off the trial." *Lord Vaughn* in *Rex* vs. *Hodgson*, 3 Car. & P. 422, 423.

The accused is entitled to be informed seasonably before the trial what specific acts, items, or transactions will be offered in proof to sustain the charge against him.

"Where the charge in an indictment is a general one, as is usually the case in an indictment of this character, it is a matter of great importance to the defendant to obtain a bill of particulars, in order that he may know specifically what he will be required to meet on the trial." *McDonald* vs. *People*, 126 Ill. 150, 158.

"It is now a general rule, perfectly well established, that in all legal proceedings, civil or criminal, bills of particulars, or specifications of facts, may and will be ordered by the court whenever it is satisfied there is danger that otherwise a party may be deprived of his rights or that justice cannot be done." *Gilmore* vs. *People*, 87 Ill. 128, 133.

"This motion was in the nature of an application for a bill of particulars, which is demandable in all kinds of actions and proceedings, where, by reason of the generality of the claim or charge, the adverse party is unable to know, with reasonable certainty, what he is required to meet. * * * The rule applies to criminal proceedings as well as civil. * * * The practice in this respect is founded upon the clearest principles of justice, and should not be departed from in any case where the circumstances require an application of the principle." *C. & N. Ry. Co.* vs. *C. & E. Ry. Co.*, 112 Ill. 589, 604. 1 *Tidd's Pr.* 334.

"Whenever the indictment is so general as to give the defendant inadequate notice of the charge he is expected to meet, the court will, on his application, require the prosecution to furnish him a bill of particulars of the evidence to be relied upon." 3 *Wharton Cr. Law*, Sec. 3156.

"Question is also raised as to the ruling of the trial court in the matter of the application of plaintiffs in error for a bill of particulars. * * * It is enough to

say that, under the rule of procedure in this State, plaintiffs in error would be entitled to such a bill of particulars upon motion." *Towne* vs. *People*, 89 Ill. App. 258, 286.

If the information does not give the details, the defendant should have a bill of particulars if asked for. *Trometer* v. *D. C.*, 24 App. D. C. 242, 250. *State* v. *Mannix*, 9 Ohio Decisions (Reprint) 667, 670 (embezzlement). Many of the cases cited hold the bill to be a matter of substantial right, especially the Illinois cases, while others hold it to rest in the sound discretion of the trial court.

"Whenever an indictment is so general as to give the defendant inadequate notice of the charge he is expected to meet, the court, on his application, will require the prosecution to furnish him with a bill of particulars specifically showing the nature of the charge against him." *Thalheim* vs. *State*, 38 Fla. 169, 180 (embezzlement). *New Orleans* vs. *Chappuis*, 105 La. 179, 180. *State* vs. *Hatfield*, 66 N. J. L. 443, 444. (embezzlement). *Jules* vs. *State*, 85 Md. 305, 309 (false pretenses).

(3) All of the cases agree that the refusal of a bill of particulars is reviewable if there has been an abuse of discretion, and a substantial injury has resulted to defendant. *People* v. *McKinney*, 10 Mich. 54, 93 (top). *Vansant* v. *Lindsley*, 2 App. D. C. 421, 423.

"However, we are not called upon now, nor are we prepared to go to the length of holding that there may not be cases of such palpable abuse of discretion, working manifest injustice, that would require an exception to be made to this general rule." *Lauer* vs. *D. C.*, 11 App. D. C. 453, 455.

On the other hand, some of the cases first cited hold the bill a matter of right, and hence reviewable on appeal.

In *Gilmore* v. *People*, 87 Ill. 128, 131, the court said:

"We cannot concede the position taken by the State that an application for a bill of particulars is always addressed to the mere discretion of the trial court, and that its exercise thereof is never subject to review. * * * The hardship entailed upon defendant by the

denial of the bill of particulars was obvious at the trial. * * * It is obvious the refusal of a bill of particulars deprived him of information to which he was entitled before the trial. For this error the judgment must be reversed." *Thalheim* vs. *State*, 38 Fla. 169, 181, 182. *State* vs. *Rowe*, 43 Vt. 265, 267. *Com.* vs. *Wood*, 4 Gray 11, 13. *Com.* vs. *Bennett*, 118 Mass. 443, 452.

(4) This record makes it clear beyond question that our motion for a bill of particulars should have been granted, either as a matter of right or sound discretion; and that in either aspect the exception to the ruling (R. 29, Ex. 2) of the trial justice should be entertained and sustained as reversible error. The injury to us, resulting from the refusal, becomes distressing when we come to consider the alleged evidence of conversion (R. 38-41, 48, 53, *infra*, Conversion). The trial began (R. 29) only a few moments after our motion was denied. We could only stop, look ,and listen, not having the slightest idea of what was coming. The granting of our motion would have gone very far to prevent some of the gravest errors in this record of the alleged trial.

In *Com.* v. *Roberts*, 22 Pa. Co. Ct. Rep. 214, the defendant was indicted in a single count for embezzlement, and a bill of particulars was asked for and granted. The indictment alleged the embezzlement of one certain sum of money on one certain day; but the bill furnished showed that this was a gross sum composed of the aggregate of numerous small sums, and it did not set forth any charge of a distinct embezzlement, but only an aggregate of many items and acts. The accused then moved for a more specific bill. The court said (p. 216, bottom) that if a single count in embezzlement comprehends a large number of distinct acts, it cannot be maintained or prosecuted; that some single, distinct act must be alleged and proved to sustain a verdict and judgment against the accused, and to this point the court quotes (p. 216) *Com.* v. *Koons*, 1 Kulp 134, and 2 *Bish. Cr. Pro.* Sec. 251 (both of which are directly in point), and then proceeds (pp. 217-218) to discuss this subject carefully. The statute of the State (p. 216) permitted the prosecution to proceed in a single count for not more than three distinct acts of embezzlement which may have been committed by the accused within six months from the first to the last of such acts. Among other things, the court said (pp. 216, 217, 218):

"This is a charge of embezzlement, set forth in a single count of an indictment, wherein there is no averment of any separate or distinct offenses, but as the bill of particulars and admission of the district attorney seem to show, of an embezzlement of a total sum of money received at divers times and as the result of numerous distinct acts * * * .

"While the various items set forth [in the bill of particulars] might, many of them, be evidence to establish some distinct act of embezzlement, the Commonwealth by them shows that in the pleadings there is not set forth any charge of a distinct embezzlement which the defendant must meet, but only an aggregate of many acts and items. * * *

"The Commonwealth will be required to furnish a statement of one or more distinct acts of embezzlement for which it proposes to prosecute the defendant upon these bills [of indictment]."

In the case at bar, the identical situation in effect is presented, as shown by the indictment (R. 1-2) and the proof (R. 36, 38-41). At various times the receivers secured from various persons various amounts, aggregating a gross sum of $24,415.13, and also the further sum of $1,532.26 (R. 36); of this sum $10,070.82 was allowed to them (R. 36) for commissions, costs, and charges; the sum alleged in the indictment is the paper balance of this gross sum, allowed by the auditor (R. 36-37) to the four distributees named in the sixth count of the indictment; and the evidence is supposed to be (R. 38-41) that this money was drawn out of one certain bank (not embezzled) at different times, by no less than ninety-two separate and distinct acts, each of which was offered and received as proof of a substantive act of embezzlement by the accused, over his objection and exception (R. 41, Ex. 14); no election among these numerous acts was ever made by the prosecution, but the trial judge actually charged the jury in terms (R.69-70) that they might convict of one or more or all of them.

We have no statute here which dispenses with the particulars of the alleged embezzlement, so as to allow a series of acts, or all the evidence of what the accused did, to go to the jury without election, leaving them a license to convict on the whole if they shall believe the accused guilty. Such statutes exist in some of the States—Illinois, Iowa, Florida, Massachusetts, Ohio, Alabama, California, Ver-

mont, and perhaps some others. Their constitutionality is still open to question.

The appellate judge says (R. 77) that this one count of the indictment is "sufficiently certain in its terms", to apprise the accused that he must be prepared to meet and defend against ninety-two distinct, substantive acts of alleged embezzlement, forty-three of which (R. 39) "were prior to January 1, 1902"—the date when the code took effect—and without the statute of limitations—three years; and he also says (R. 77) that the matter was "within the discretion of the trial court; and there is nothing to indicate the slightest abuse of that discretion." This conclusion is in line with the doctrine of the Court of Appeals that reversible error is practically impossible in criminal cases if the accused is convicted. We think there was the grossest abuse of discretion in the premises.

What information, even the slightest, does the indictment give us as to any specific act or evidence that will be offered to prove the charge? How could we be expected or required to defend against every one of the ninety-two items put in evidence, covering eight and one-half years, with no election at any time of any act relied on for conviction? Could not the pleader have been more specific? Could we anticipate or be prepared to defend against all of the alleged evidence of conversion (R. 38-41) that was received? Comparison of the indictment and proof answers emphatically in the negative. The guaranties of the Fifth and Sixth Amendments, as to indictments for crime and information as to the nature and cause of the accusation, cannot be denied under the guise of refusing a bill of particulars, and the order be not subject to review; for this would permit the trial court's discretion to override the Constitution. Either this indictment or the denial of particulars violates the fundamental rights of the accused.

Had this been a petty case before a justice of the peace, involving a few cents, the following Rule 4, prescribed by the trial court in general term, would have controlled:

> "In every action to recover money the plaintiff shall file a bill of particulars showing the nature and items of his claim, with a copy thereof to be served on the defendant with the copy of the summons; and if the same be not so filed, the defendant shall be entitled to a continuance at the cost of the plaintiff, who shall be al-

lowed a reasonable time to file the same, and upon his failure so to do within such time, the cause shall be dismissed at the cost of the plaintiff."

V. CONTINUANCE.

(1) The denial (R. 29, Ex. 3) of our motion for a continuance (R. 10-16) "for a reasonable time", effectually killed the order (R. 7) for commission and letters rogatory, and deprived the accused of his affirmative defense on the merits and of the assistance of counsel, and left him the subject of a practically *ex parte* trial. Our application recites all (R. 10-11) the prior proceedings; the many consultations day and night between the accused and his counsel; the materiality and details of the testimony of his non-resident witnesses (R. 11-14); the immediate retainer of his counsel (R. 14); that he has a good and valid defense, the nature of part of which will require examination of an elaborate account and many papers, many of which have become intermingled through no fault of his, with a large mass of others, and which it will take some time and labor to find (R. 14); that various proceedings at law and in equity and in other courts are involved, some of which are intricate, but essential to be understood by his counsel (R. 14); the prosecutor has had all of the material papers and records in Eq. 15907 in his exclusive possession in his office ever since the indictment was returned, if not longer (R. 14-15); we cannot properly prepare for trial without opportunity freely to inspect said papers and records and others mentioned (R. 15) "which opportunity they have not had"; another obstacle was the prosecutor's order to the Trust Co. not to show, or give us any information about, certain material checks, certificates and accounts, and his request for delay on our application to him for permission to see the same (R. 15); the preliminary proceedings have occurred with such unusual haste and rapidity as to take up all our time, and "reasonable time and opportunity are now required to prepare the case for trial on the facts; that affiant's counsel do not yet know of the material facts or the details of such facts in this case, as neither affiant nor they have had any reasonable time to collect them or the parol and documentary evidence to support them" (R. 15); he has been compelled to attend to calls for papers and information required by local

courts in other cases (R. 15); he has given an average of fifteen hours per day to this case, and sometimes twenty-four, and twice had to be out of the city about it (R. 15); if his New York witnesses were summoned here it would require some short time for them to produce the documentary evidence required (R. 15-16); and in conclusion "that this application for continuance is made in good faith, and not for the purpose of delay; and that this defendant desires a trial as soon as he reasonably can prepare for it" (R. 16). This is a brief statement of the substance of the accused's affidavit for continuance, which lacks the details and force of the original (R. 10-16), to which we earnestly invite this court's attention. This affidavit is fully supported by those of Messrs. Baker and Walker (R. 16), saying also "that they are not prepared for trial of this case on May 8, 1905, although they have devoted all the time and attention to it that they reasonably could; that they have exercised unusual diligence in this cause, and a reasonable continuance is absolutely necessary in order to prepare properly for trial; and that *without such continuance they can be of no substantial service to the said defendant* on trial on May 8, 1905." Please see also our affidavit (R. 22-24) in support of our motion for new trial (R. 20-22) and that motion itself. Mr. Beach's affidavit (R. 17) is forceless in face of the above six affidavits and the recital of the bill of exceptions (R. 28) that on "last Thursday [May 4] the United States Attorney had invited the defendant and his attorney to examine the papers at any time in his office." One of the necessary effects of refusing the continuance led to this argument by the then assistant prosecutor, to the jury (R. 65); "And you have seen, gentlemen, how the case has been fought. Counsel have day after day stood in this court like phonographs, the passive mouthpieces of the defendant, who has conducted his own defense." The accused was entitled "to have the assistance of counsel for his defense"; yet, by no fault of theirs, he only had their presence, and was denounced to the jury for the error of the court in depriving him of their assistance. This record is evidence of his counsels' ability, zeal and fidelity, under circumstances so adverse and unfair as to justify any lawyer in withdrawing from the case; but be it said to their credit that they refused to do so, and did their best.

(2) The *Maryland Declaration of Rights*, Sec. 19, says "that in all criminal prosecutions, every man hath a right to be informed

of the accusation against him; to have a copy of the indictment, or charge, *in due time,* (if required), *to prepare his defense.*" The accused is entitled absolutely to reasonable time to prepare his defense; and this applies to all crimes, however heinous. 12 *Cyc.* 503, 535, and many cases cited. In *Allen* v. *United States,* 115 Fed. 3 (C. C. A.), a motion of defendant for continuance to get the testimony of an absent witness was denied, by which he was deprived of it, and the conviction was reversed (p. 13) because "the defendant did not have a fair and impartial trial." The denial was excepted to and this exception was considered on appeal. The opinion is a powerful demand that every accused person shall have a fair and impartial trial, and every word of it is applicable to this record. The defendant must have compulsory process for his witness, "with reasonable time and opportunity to obtain the benefit of the same." *Adkins* v. *Com.,* 98 Ky. 539, 556 (in which the conviction was reversed for refusal of a continuance in order to give the accused reasonable time to get the testimony of material absent witnesses under compulsory process awarded for that purpose). We were not only denied any time or opportunity to obtain any benefit from the order (R. 7) for commission and letters rogatory, but were even unable to get our local witnesses Tichenor and McConville (R. 18). The commission and letters rogatory were "compulsory process for obtaining witnesses in his favor", for words in the Constitution are presumed to have been used in a broad sense with a view of covering all contingencies, and do not ordinarily receive a narrow and contracted meaning. *In re Strauss,* 197 U. S. 324, 330. "No narrow or illiberal construction should be given to the words of the fundamental law" as to the rights of the accused. *Ex p. Lange,* 18 Wall, 163, 178. If the Government had asked for a continuance in this case on the same or less or no showing, would it have been denied? Yet the Sixth Amendment was made to protect the accused, not the Government.

(3) An order denying a continuance will be reviewed an error or appeal if there has been an abuse of discretion by the trial court. *Foertsch* v. *Germuller,* 9 App. D. C. 351, 356. *Isaacs* v. *United States,* 159 U. S. 487, 489. *Goldsby* v. *United States,* 160 U. S. 70, 71. *Means* v. *Bank,* 146 U. S. 620, 629.

> "The discretion which a trial court exercises must be judicial and not arbitrary; it is the guardian of the

rights of the accused as well as of those of the people at large, and should not unduly force him to trial. * * * It is not necessary, to constitute abuse, that the court acts wickedly or with intentional unfairness. * * * Where it is shown that the evidence of the absent witnesses is material and admissible; that the testimony, in view of the established facts, is not probably untrue; that their attendance can probably be secured at another term; that the facts expected to be proved cannot be obtained from other disinterested witnesses; and that the defendant has exercised proper diligence to procure their attendance, a denial of a continuance under such circumstances would operate unfairly to a defendant, would deprive him of a fair and impartial trial, and would, therefore, constitute reversible error. * * * A refusal to grant a continuance because of an absent witness merely on the ground that there were other witnesses to the difficulty is error, where it appears that the testimony of the absent witness is material and important. * * * The non-residence of a witness does not of itself justify the court in refusing a continuance where the statute provides for obtaining testimony by deposition. * * * The question is not merely whether or not the court will be able to coerce or enforce the attendance of the absent witness; if there is reasonable ground to believe that such witness will be had by a continuance it should be granted, although he be without the State. * * * An application for a continuance to procure record evidence or depositions rests substantially on the same merits as when made because of the absence of witnesses. * * * Where a party has fulfilled all legal requirements, a refusal to grant a continuance to enable him to secure such evidence is error. * * * And it of course goes without saying that no convenience of the court, or condition of the docket of the cases for trial, or statutory enactment, can authorize the denial of any of the rights guaranteed to a party by the Constitution of the United States. * * * The constitutional guaranty to an accused of the right of compulsory process for the attendance of his witnesses should not be trifled with or made a dead letter, and no rule of practice or statute can be applied or so interpreted as to contravene this guaranty, or deny the right to such process, and a reasonable time for its service or execution. * * * Where no lack of diligence is shown, either on the part of the

accused or his counsel, it is reversible error to refuse to grant a continuance where it is clear that counsel have not had sufficient time to investigate and examine the law applicable to the case. [The reason being that to deny a continuance in such a case would be to convert the inestimable right guaranteed a party charged with crime of the assistance of counsel into a meaningless formality.]

"* * * The accused, however, must be accorded all reasonable facilities in the preparation of his defense. * * * It is agreed that the failure to prepare for trial and subpoena witnesses before an indictment or information is found is not such lack of diligence. * * * A continuance should not, however, be refused on purely technical grounds [*Trevinio* vs. *State*, 1 Tex. App. 72, 74, in which a continuance was refused because the indictment was for the theft of a gelding, and the affidavit for continuance called it a horse, and the conviction was reversed for refusal of the first continuance asked.] * * * An application for a continuance on the ground of absent witnesses * * * must specifically set forth the facts expected to be proved by such witnesses so that the court may judge of the materiality of the same—* * * facts to which it is expected an absent witness will swear. * * * The affidavit must also aver that the affiant believes that the testimony which he expects the absent witness to give is true. * * * Counter affidavits will not be received. * * * Although the court, when judged by the facts and evidence before it at the time of passing on the motion [for a continuance] may be held to have exercised a sound discretion in its refusal, yet, if, when all the evidence is in and everything transpiring at the trial of the cause is considered, it is clear that defendant's rights have been prejudiced, the court must remedy its mistake by granting him a new trial."

The foregoing quotation is from an elaborate article on continuances in criminal cases in 9 *Cyc.* 163-269, in which the cases are fully collated.

A decision denying a continuance may be reviewed on exception. 2 *Cyc.* 719. 3 *Cyc.* 161, 334. If the defendant has a defense, the benefit of which has been denied him, the appellate court will reverse and remand for this reason alone, even though such denial has re-

sulted from his own careless conduct. *Wagenhurst* v. *Wineland*, 22 App. D. C. 356, 367. *Wiggins Ferry Co.* v. *Ohio & M. Ry. Co.*, 142 U. S. 396, 413.

The trial judge gave (R. 29) no reason whatever for denying the *only continuance asked*, but the appellate judge (R. 78-80) is at some pains to justify this summary ruling. He says (R. 78) that we asked "for continuance to procure the testimony of three witnesses, two of whom resided in New York City, and one was then somewhere in Europe, where he expected to remain for two years."

The desire to get the testimony of our non-resident witnesses was only one of the many equally important grounds of which our motion was predicated, such as the unpreparedness of counsel, the denial of inspection of the equity papers, the temporary loss of important papers, etc., but of the others the appellate judge significantly says nothing whatever. Our motion (R. 5) for letters rogatory says that Charles F. Miller is "a resident of and now to be found in the city of London, England, being a material witness for this defendant." The affidavit in support (R. 5-6) repeats this statement, and adds (R. 6) "that the address of the said Charles F. Miller is care of R. Hoe & Co., London, England"—not merely "somewhere in Europe", as the appellate judge (R. 78) puts it. Our affidavit for continuance recites (R. 11) "that it has required some time and effort on the part of affiant to locate Charles F. Miller, named in the said motion for letters rogatory, as the said Miller left this District in the year 1904 to go to Lisbon, Portugal, and on information and belief, will not return until about two years from now."

R. Hoe & Co. are well known throughout the whole civilized world as the leading manufacturers of printing presses, and Miller's given (R. 6) address "care of R. Hoe & Co., London, England", was absolutely certain and definite, he was there and would be there when the letters arrived, and we knew it. Miller returned to this city only a few months after the order for the letters rogatory—and he has been here ever since, and will remain here indefinitely, and will testify positively to the facts stated.

The proposed evidence of Gilbert and Hotchkiss, sought under the commission, was not incompetent, but as we insist that the prosecution's proof in this case affirmatively disproved the ownership as laid in the third count upon which this judgment rests, we shall not now discuss the question.

Miller's testimony, the appellate judge says (R. 79), "does not show a good defense". It was only intended to supplement other evidence proposed to be offered (R. 13). The affidavit for letters rogatory recites (R. 6) "that by the said Miller this defendant will prove that a large part of the said money passed lawfully into the exclusive manual custody and control of Andrew A. Lipscomb, named in the said indictment, for the sole purpose of *bona fide* investment thereof by him in certain safe securities, and that this defendant did not convert the same or any part thereof to his own use." The affidavit for continuance recites (R. 12-13)) that the accused "expects to prove by the said Miller that a certain large part and specific sum of the moneys alleged in said indictment to have been converted, passed lawfully into the exclusive possession, custody and control of the affiant's co-defendant on or about June 20, 1903, for the sole purpose of *bona fide* investment thereof by said co-defendant in certain safe securities, and that the same never came into the exclusive possession or control of this defendant, and that this defendant did not convert the same or any part thereof to his own use—this proof to supplement other evidence proposed to be offered as to the lawful disposition of all the moneys mentioned in the said indictment, so far as this defendant is concerned," etc. There was no admission by the prosecution of any of the facts which we expected to prove by our non-resident witnesses.

The appellate judge's statement (R. 79) that " by all three witnesses" the accused expected to prove the non-ownership of the Association, named in the third count, is incorrect, for Miller's testimony had no reference whatever to the ownership. He further says (R. 79) that "as to the witness Miller, his location was uncertain"; yet we showed his exact location (R. 6); that (R. 79) "there was nothing to show a reasonable probability that his evidence could be procured within any definite period if at all"; yet we showed the very contrary, and there was absolutely nothing to contradict our showing. His testimony could and would have easily been taken and returned within one month from the time the letters went out; but we were given no chance whatever to get it. Then the judge says (R. 79) that " the particular facts that he was expected to testify to were not stated"; but they were, and he himself states (R. 79) part of them from our own showing. We even referred (R. 13) to our *filed interrogatories to Miller*—"Affiant further says that he

is advised that while it is proper that he should state herein the facts which he proposes to prove by his said non-resident witnesses, it is not necessary that he should recite at length the details of their evidence, and the documents tending to prove such facts; and affiant therefore refers for any such or further details, to his filed interrogatories to the said witnesses" (R. 13). These interrogatories were included in full in the transcript of record filed in the Court of Appeals (R. 72, items 9, 10, 11); but were not printed because we thought it unnecessary (R. 74), as we have said.

The judge further says (R. 79-80) that "the general statement that he [Miller] would testify that a large and specific sum of the moneys had passed lawfully into the hands of defendant's co-receiver, for the sole purpose of *bona fide* investment, does not show a good defense"; but the statute requires that the accused shall fraudulently convert the money *to his own use*. Why, then, was Miller's proposed testimony immaterial? Had it no relevancy or legitimate bearing even upon the question of the fraud required? Or upon the inquiry whether the accused converted the money "to his own use"? Was it no defense for the accused to show that he "did not convert the same or any part thereof to his own use"? The law is and must be otherwise. *Burnett* v. *State*, 62 N. J. L. 510, 513. 15 *Cyc.* 510. In considering the alleged conversion *infra*, we cite many other cases bearing upon this point. Necessarily the judge cites none to support his radical conclusions. In the *Burnett* case, *supra*, the court said (p. 513):

> "The court below refused to admit evidence tending to show that such residue [the controversy under the indictment for embezzlement was whether or not the accused had fraudulently taken and converted to his own use $1300, the residue of a fund of $3000 received by him as bailee, agent and servant] had, without the knowledge or consent of the defendant, been misappropriated by his son, with whom he was associated in the real estate business, and who was authorized to draw against the special bank account of said business in which the fund had been deposited. * * * The defendant is entitled to assign error upon it in view of the distinct ruling of the court that proof of a misappropriation by an agent would not relieve the defendant under the statute. Civil liability was thereby confused with criminality. To warrant a conviction under a stat-

ute like that *sub judice* a fraudulent intent is essential. *The excluded proof was legitimate on that subject, and the defendant was entitled to have it considered by the jury.* Let the judgment be reversed."

The court below proceeds (R. 80):

> "The funds were in the possession of the receivers jointly, and subject to the control and disposition of the court. They had no authority to pay them out or to invest them in securities of any kind save upon order of the court; and it is not pretended that such an order was made."

Not only one, but at least fifty such orders were actually made and obeyed, and all of the disbursements made under them were received in this case as evidence (R. 38-41) of their embezzlement by the accused. Some of these orders directed many payments, others but one. Some were general, others special. The prosecutor had all of them among the papers and records removed by him; and two such disbursements were made (R. 39) under an order of the Court of Appeals itself (21 App. D. C. 344, 369), and they too were received as evidence (R. 38, 39) of embezzlements by the accused of the amount of each.

The appellate judge further says (R. 80):

> "Nor could one of them draw the money from the bank of deposit without the other's signature";

but one could and did lawfully act for both in a very few instances, by express authority (R. 40) of his co-receiver, and in cases of emergency. The law permits this. *Ubhoff* v. *Brandenburg*, 26 App. D. C. 3, 7. *Howard Ins. Co.* v. *Chase*, 5 Wall. 509, 514.

He then concludes (R. 80):

> "It would be an extreme case that would require a court to continue a case indefinitely for the purpose of procuring evidence, even if shown to be plainly competent and material";

but we did not ask the trial court to continue the case indefinitely, but only (R. 10) "for a reasonable time, for the reasons set forth", of which the testimony of the non-residents was but one.

The appellate judge in effect holds that on an infamous charge the innocence of the accused is no defense, and therefore he is not

entitled to a continuance to prepare for trial, or to get the necessary evidence to prove it. The court below becomes even more radical in its consideration (R. 82-83) of the alleged proof of fraudulent conversion, and falls into a sharp conflict with the trial judge (R. 55-56) on the effect of the witness Mead's testimony, which it says (R. 83) shows of itself a fraudulent conversion as to that item, but which in the jury's presence the trial judge (R. 56) said showed "an absolute defense to that item."

The trial judge, as we have said, did not attempt to give any reason whatever to justify his refusal of a continuance. It was plainly impossible for him or any one else to give any good reason for his arbitrary ruling. His silence, however, affords far more excuse for his remarkable action than the alleged reasons stated by the appellate judge. There was a gross abuse of discretion in the premises. The accused was deprived of all of his home-born rights, under the guise of denying him a continuance. *He was simply railroaded to conviction at any cost, without the slightest chance to make any affirmative defense on the merits.* No case can possibly be sufficiently irritating to warrant any court in ignoring the Sixth Amendment. If the accused was not entitled to a reasonable continuance in this case, none can be conceived.

Mead's testimony (R. 54-55) was of identically the same character as that sought from Miller, and the trial judge held it material (R. 56) on a direct motion of the prosecution to strike it out; but the appellate judge takes the very contrary view (R. 83), in order to find some excuse for the refusal of the continuance. If Mead's testimony was material—and both judges held it to be so (R. 56, 82, 83)—then Miller's must have been so too.

Had the appellate court construed section 841 with one-tenth the strictness it applies to our motion for continuance, we should have reached the end of this case long ago; but all convictions must be affirmed. *Ipse dixit.*. In *Clyatt* v. *U. S.*, 197 U. S. 207, this court said (p. 222):

> "Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

The record in this case shows no respect whatever for that principle.

VI. EFFECT OF PLEA.

The plea of not guilty (R. 17-18, 29) put in issue every material allegation of the indictment, and denied the truth of the evidence against the accused. *People* v. *Everhardt*, 104 N. Y. 591, 595. In *U. S.* v. *Taylor*, 11 Fed. Rep. 470, the court said (p. 494):

> "By his plea of not guilty the defendant must be understood as denying the truth of the information or indictment, and as not conceding the truth of what the witnesses for the Government have sworn to. This is so, notwithstanding the fact that no witness for the defendant contradicted the statements of the witnesses for the prosecution."

VII. THE RECEIVERSHIP.

(1) The Pleading.

Under section 841, and all the decided cases, the fiduciary capacity is an essential element of the offense, and must therefore be properly averred. This indictment (R. 1-2) alleges that on Nov. 23, 1903, the accused "were receivers, that is to say, were receivers under a certain order of the Supreme Court of the District of Columbia, holding an equity court, dated the sixth day of November," 1894, in Eq. 15907, entitled, etc. No other facts or particulars of the alleged receivership are given; but it is not only necessary to aver the receivership, but also the particulars thereof.

(*a*) That the fiduciary capacity is an essential element of the crime, and must be strictly stated, is well settled. *Moore* v. *U. S.*, 160 U. S. 268, 272. *Green* v. *U. S.*, 25 App. D. C. 549, 551. *State* v. *Knobles*, 43 La. Ann. 200, 202. 15 *Cyc.* 519. *Washington* v. *State*, 72 Ala. 272, 276. *Griffin* v. *State*, 4 Tex. App. 390, 416. *State* v. *Bailey*, 50 Ohio St. 636, 645. *McConn* v. *U. S.*, 2 Wyo. 267, 286. *Grin* v. *Shine*, 187 U. S. 181, 196. *State* v. *Carmean*, 126 Iowa 291, 295.

(*b*) It is equally well settled that the particulars of the alleged fiduciary capacity must be set out in the indictment, and especially the purpose for which the property or money was intrusted or delivered to the accused; otherwise it is fatally defective. *Com.* v. *Smart*, 6 Gray 15, 16 (approved in *Moore* v. *U. S.*, 160 U. S. 268, 272). In *State* v. *Griffith*, 45 Kan. 142, the court said (p. 144):

> "The mere allegation that he was a bailee [here receivers] is too general and indefinite, and does not fairly inform the defendant of the nature and cause of the accusation against him. The information should state who placed the property in the hands of the defendant, the purpose or use to which it was to be applied, and the time within which the purpose was to be carried out, or the time within which the property was to be returned."

(*c*) This indictment (R. 1-2) gives no particulars of the alleged receivership; nothing is stated as to what the receivership order included; from the face of the pleading, it is impossible to say whether the order authorized the accused to receive any money, or what money or property, or for what purpose, or with what power or authority they were appointed as receivers; all connection between the recited money and order is left wholly to intendment and implication there is no allegation that the accused ever qualified or acted as receivers; the pleading gives nothing more than a mere reference to a collateral source of information, instead of stating the essential facts themselves.

The indictment attempts to allege that the accused were *de jure*, and not *de facto* receivers.

(*d*) It is also essential that an indictment for embezzlement shall particularly describe the property which is the subject of the trust and alleged to have been embezzled. *Com.* v. *Smart*, 6 Gray 15, 17. *People* v. *Cox*, 40 Cal. 275, 277. *State* v. *Stimpson*, 24 N. J. L. 9, 28. 12 *Ency. Pl. & Pr.* 977. In *Moore* v. *U. S.*, 160 U. S., 160 U. S. 268, the court said (p. 272) that "the property embezzled must be identified with great particularity"; and further said (p. 274):

> "The property embezzled should be identified with particularity, the general rule in the absence of a statute being that an averment of the embezzlement of a certain amount in dollars and cents is insufficient."

This rule applies to all indictments against private persons or officers, of whom a chancery receiver is one; but this indictment (R. 1-2) merely describes the property as money without more, and contains only "an averment of the embezzlement of a certain amount in dollars and cents."

(c) These and the other defects of the indictment are pointed out by our demurrer (R. 2-4), and therefore they are not aided or cured by the verdict (R. 18). *Moore* v. *U. S.*, 160 U. S. 268, 276. *U. S.* v. *Johnson*, 26 App. D. C. 136, 140. In addition, the omitted "particulars are matters of substance, and not of form, and their omission is not aided or cured by the verdict". *U. S.* v. *Hess*, 124 U. S. 483, 488-489. Substantial defects of the indictment are also set out in our motion in arrest of judgment (R. 16), including the omission to aver the qualification of the accused (R. 19, par. 3), and this omission is also made one of the grounds of our motion for new trial (R. 21, par. 8). It may have been intentional, in view of the evidence.

(2) The Proof.

(a) It is, of course, necessary to prove the alleged *de jure* fiduciary capacity strictly as laid; or, as the court said in *McNish* v. *State*, 88 Ga. 499, 500:

> "In order to convict the accused it was necessary to prove the creation of the trust described in the indictment, and a fraudulent breach of it in the manner alleged. To charge one trust and prove another would not suffice."

In *State* v. *Bailey*, 50 Ohio St. 636, the court said (p. 645):

> "It is true that it is the act of conversion that gives to the transaction its odious and repugnant character, but proof of the contract establishing the relation is no less important than is proof of the conversion itself."

This proof cannot be dispensed with, nor supplied by the doctrine of estoppel, for the statute imperatively requires the fiduciary relation to be an actual fact. The accused cannot be estopped from questioning or relying upon the fatal defects of the Government's proof; and it is settled by authority and sound reason that there is no estoppel of the accused even to deny affirmatively his authority or fiduciary relation in the receipt of the money or property. 10 *Am. & Eng. Ency. Law* 992, and cases collated. A chancery receiver is the officer of the court, and not the agent of the parties.

The receivership order (R. 31) recited in the indictment (R. 1-2), as a condition precedent requires the appointees to qualify by giving separate bonds; and it was therefore absolutely necessary for the Government to prove that the accused had given the bond required in order to show that he was a receiver as alleged; for an appointee without qualification is no more a receiver than is one by qualification without appointment. *Frayser* v. *Richmond Ry. Co.*, 81 Va. 388, 390, 393. *Phillips* v. *Smoot*, 1 Mackey 478, 486. *Moran* v. *Morgan*, 154 U. S. 256, 283. *Chamberlain* v. *Rochester Co.*, 7 Hun. 557, 559. *Johnson* v. *Martin*, 1 Thomp. & Cook 504, 505. *In re Christian Jenson Co.*, 128 N. Y. 550, 553.

The charge of the indictment that the accused was a *de jure* receiver under the special order recited therein, is not met by proof that he was a *de facto* receiver, for the very trust and fiduciary relation alleged must be strictly proved. The court cannot reform this indictment. The evidence in this case did not show "that the defendant was a receiver as charged in this indictment", as the trial court peremptorily (R. 66) told the jury.

The Government wholly omitted to prove, or even to make an attempt to prove, the fact that the accused had qualified by giving the bond required, and therefore it failed to prove the *de jure* fiduciary relation alleged. The accused had the right "to rest upon the Government's omission of proof of that fact", as was said in *Clyatt* v. *U. S.*, 197 U. S. 207, 219. A *de facto* chancery receiver is unknown.

Section 841 applies only to *de jure* officers and employees. A chancery receiver cannot be created by estoppel. He is a private, not a public officer. What a court of equity could do with one appointed as a receiver who failed to qualify but acted as such, is beside the question, as is also the query whether that court could omit qualification, for here this order imperatively requires it.

One court cannot take judicial notice of the bond given by an appointee of another court in another cause though such bond has become part of the record of that case, but the bond itself must be produced and proved as the primary evidence of the fact of qualification. *Bank* v. *Beverly*, 1 How. 134, 151. *Downing* v. *Howlett*, 6 Colo. App. 291, 293. *Wagenhurst* v. *Wineland*, 22 App. D. C. 354, 366. No foundation for secondary evidence of qualification was laid or attempted to be laid in the present case.

(*b*) The question of receivership *vel non* was one of fact for the jury. *Com.* v. *Foster*, 107 Mass. 221, 222. *Com.* v. *Bennett*, 118 Mass. 443, 448, 454. *Green* v. *U. S.*, 25 App. D. C. 549, 551. *People* v. *Treadwell*, 69 Cal. 226, 230. This was so, notwithstanding no witness for the accused impeached the proof of the Government; for the jury had the right to pass on the genuineness of the documentary evidence offered, and the credibility of the prosecution's witnesses, whom they were not bound to believe. *U. S.* v. *Taylor*, 11 Fed. Rep. 591, 595. If the court had the right to charge peremptorily on the fact of receivership, it had an equal right so to charge on every other essential fact in issue, and thus destroy the right of the accused to trial by a fair and impartial jury, which in this and other respects was most effectually done in this case.

The trial judge told the jury (Prayer X, R. 60, Prayer XI, R. 61, Prayer XIII, R. 61, Prayer XV, R. 62) that the Government was bound to prove beyond a reasonable doubt that the accused was a receiver as alleged in the indictment, and that this was a question of fact to be decided by them; but after these prayers had been given, and after the arguments had been made that showed the Government's omission of proof in this respect, he promptly supplied the omission, destroyed the prayers, usurped the functions of the jury, and invaded the constitutional right of the accused to have the jury decide this fact, by peremptorily charging (R. 66) them as follows:

> "You may take it as a matter settled by the proceedings of that court that the defendant was a receiver as charged in this indictment."

(*c*) As there was no legal evidence that the accused was a receiver "as charged in this indictment", the trial judge should have directed acquittal. He had no right whatever to submit to the jury an alleged fact of which there was no evidence (*Burton* v. *U. S.*, 196 U. S. 283, 301. *Gassenheimer* v. *U. S.*, 26 App. .D C. 432, 447), and still less to charge peremptorily the existence of an essential fact in issue of which there was no legal proof. He should have granted our prayers (R. 59, Pr. 1, Ex. 35; R. 59, Pr. IV, Ex. 36) for a verdict of not guilty on all of the evidence in the case, for this reason alone, even if the many other fatal defects were absent. It may be said that this point is technical; but it is certainly no more so than that

which caused the reversal of the conviction in *Clyatt* v. *U. S.*, 197 U. S. 207, 219, in which the indictment charged a return of negroes to a condition of peonage, but the Government omitted to prove that they had ever been in such condition, whatever the actual fact may have been. The point was not made nor saved in the trial court, but this court noticed it as a plain error not assigned, and in concluding the opinion said (p. 222):

> "No matter how severe may be the condemnation which is due to the conduct of a party charged with a criminal offense, it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements. Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained."

(*d*) If it be said that this defect of proof was not reserved in the trial court, the record answers to the contrary; and if it be said that this peremptory charge was not excepted to, the answer is that no exception is required for the review of a ruling which deprives the accused of a constitutional right; for in such case a conviction will be reversed and the case remanded for trial *de novo*, "notwithstanding there might not have been an exception taken to the illegal proceeding." *Price* v. *U. S.*, 14 App. D. C. 391, 404. In *Hopt* v. *Utah*, 110 U. S. 574, this court said (p. 579):

> "That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused; much less by his mere failure, when on trial, to object to such unauthorized methods."

In addition, it is well settled that the appellate court may notice a plain error not assigned, in a matter prejudicial to the accused; and correct it by reversal, although the question may not have been raised by objection and exception to the action of the trial court. *Wiborg* v. *U. S.*, 163 U. S. 632, 658. *Clyatt* v. *U. S.*, 197 U. S. 205, 221. *Jackson* v. *U. S.*, 42 C. C. A. 452, 456. This right is freely exercised in criminal cases, because exceptions are required by rules of mere procedure and practice; and neither the law nor the court ex-

acts the life or liberty of the citizen as the penalty for a failure of his counsel to obey such rules, if he is thereby deprived of any substantial right. *State* v. *Pierce,* 8 Nev. 291, 304. In *Allen* v. *U. S.,* 52 C. C. A. 597, 606, the court said that "no technicality, except by the express letter of the law, should ever deprive an accused person of a substantial right."

Moreover, when an exception to a certain ruling has once been taken, it need not be repeated to the charge, or to the same ruling made at later stages of the cause, but it will even reach back to the same ruling previously made and passed without objection or exception at that time. *Boyd* v. *U. S.,* 142 U. S. 450, 457. *Waldron* v. *Waldron,* 156 U. S. 361, 382. *Allen* v. *U. S.* 52 C. C. A. 597, 603. This is also the uniform rule of the state courts. It comes into play more than once in this case, and perhaps was in the mind of the appellate judge when he spoke (R. 81) of "many points made on * * * exceptions taken to the charge of the court", for the record (R. 65-70) is silent as to any repeated or special objections or exceptions to the charge, as every subject of objection to it had been fully covered by exceptions previously reserved.

(*e*) Although the foregoing objections to the sufficiency of the indictment and proof as to the alleged fiduciary relation were properly presented and fully argued in both courts below, yet the appellate judge did not deign to notice them at all in his opinion, just as he wholly ignored some of the most vital points in this case, to which we shall refer, and which we not only deem unanswerable, but which even no attempt to answer has ever been made by any of the judges below or the counsel for the Government.

VIII. THE POSSESSION.

Section 841 in terms requires possession by virtue of the office or employment, and it is necessary that an indictment for embezzlement shall aver such possession, or it is fatally defective. *Moore* v. *U. S.,* 160 U. S. 268, 270, 272. This indictment alleges (R. 2) that the money had come into the possession of the accused by virtue of their office and employment "as such receivers," as already mentioned.

If we are right in our contention that the Government omitted to prove that the plaintiff in error was a receiver "as charged in this

indictment," then it necessarily follows that it also failed to prove that the money had come into his possession by virtue of his office or employment "as such receiver."

Section 841 requires possession as such. It does not apply to cases of custody, charge or control. A mere custodian cannot commit embezzlement under this statute, by the settled law. The N. Y. Penal Code, section 528, includes "possession, custody, or control." An ordinary chancery receiver, such as we have in this case, is a mere custodian of the property, without "even the right of possession." *Union Bank* v. *Bank of Kansas,* 136 U. S. 223, 236. *Great Western Co.* v. *Harris,* 198 U. S. 561, 576. Section 841 was evidently designed to apply only to the receivers previously provided for in the code itself, by sections 773-780—that is, to statutory and not to so-called "common-law" or chancery receivers, as the former are not mere custodians, but get both possession and the right of possession by virtue of the statute.

IX. THE OWNERSHIP.

(1) Ownership Was Not in the Association.

(A) The Pleading.

The third count of the indictment (R. 1-2), of which this judgment is predicated, charges the money as *"being* the property and moneys of the Washington Beneficial Endowment Association, a body corporate."

(a) Under section 841, and the decided cases, the ownership must be alleged, so as to show that the money is "of the property or estate of any other person" than the accused. This is descriptive of the offense, and is an essential element, for one cannot embezzle his own property, under this statute, nor that of which he is a part owner; but it must belong exclusively to some other person.

That the allegation of the ownership of the property charged to have been embezzled is indispensable, cannot be questioned. *Grant* v. *State,* 35 Fla. 581, 585. *State* v. *Roubles,* 43 La. Ann. 200, 203. *Washington* v. *State,* 72 Ala. 272, 276. *Reeves* v. *State,* 95 Ala. 31, 41. 7 *Ency. Pl. & Pr.* 454. *Griffin* v. *State,* 4 Tex. App. 390, 415. *Crane* v. *State,* 26 Tex. App. 482, 483. *State* v. *Lyon,* 45 N. J. L. 272, 274. See *Kirby* v. *U. S.,* 174, U. S. 47, 61.

The indictment must show the ownership with the same particularity as in larceny. 15 *Cyc.* 517. *MacGregor's Case,* 2 Leach Crown Law 932, 938. *Rex* v. *Johnson,* 3 M. & S. 539, 548. *State* v. *Tracey,* 73 Md. 447, 448. *Bish. New Cr. Pro.* Sec. 320. *State* v. *King,* 95 Md. 125, 128. *State* v. *Blizzard,* 70 Md. 385, 386. See *Grin* v. *Shine,* 187 U. S. 181, 196, and *Moore* v. *U. S.,* 160 U. S. 268, 272. In *Com.* v. *Parker,* 165 Mass. 525, the court said (p. 539):

> "The offense of embezzlement has been often stated to be larceny committed by a certain class of persons, without a trespass; or, in other words, a statutory larceny"—larceny less trespass.

So material did the Government consider the element of ownership that this alone gave rise to eight counts in the indictment, differing only in this respect. Our demurrer was sustained (R. 5) as to four counts for failure to allege the ownership properly.

(*b*) The indictment (R. 1-2) alleges the ownership only by way of recital, and not directly; but it is elementary that this essential averment, like all others, "must be made directly, and not inferentially or by way of recital". *Pettibone* 1. U. S., 148 U. S. 197, 202. *U. S.* v. *Hess,* 124 U. S. 483, 486. 12 *Ency. Pl. & Pr.* 958. It is also necessary that the ownership be laid as of the date of the alleged offense. Unless the rule against a charge by way of recital was made merely to break, this allegation of ownership is fatally defective.

(B) The Proof.

The facts shown to prove the alleged ownership of the Association were merely that it owned certain real and personal estate in 1894; that it sold and conveyed this property absolutely and in fee on August 9, 1894, by deed and transfer of that date, to the Commercial Alliance Life Insurance Company, a New York corporation, for a consideration of $14,000 cash and the assumption of certain obligations; that creditors of the Association filed proceedings to declare the vendee a trustee of the property for them, on the ground that the sale was constructively fraudulent in equity as against them; that receivers were appointed in November, 1894, who sold the property in 1895; that in June, 1896, a final decree was passed setting aside the deed of the land to the Company, and awarding the net proceeds of the real estate to the Association creditors; that the creditors en-

titled to the said net proceeds were afterwards ascertained to be the four distributees named in the sixth count of the indictment, and the fund was finally decreed to be paid (and was paid) to them to the amount ($15974.07) named in the indictment, and the balance was awarded to the receivers to the amount of $10,070.82. The substance of the entire evidence of ownership as such is set out below, in the order—or rather disorder—in which it was offered by the Government.

The ruling of the appellate judge is that a vendor, whose sale is vacated merely in behalf of his creditors, as constructively fraudulent in equity as against them, thereby reacquires his ownership, or it remains in him (R. 80), as against his vendee and persons not creditors, though no reconveyance to the vendor is ever decreed or made.

The proof further showed that the Association was dissolved as a corporation on August 9, 1894, and never came to life again, and never thereafter reacquired any ownership of or interest in either the land or its proceeds, or the personalty or its proceeds.

(*a*) It is, of course, necessary that the proof shall sustain the allegation of the Association's ownership; otherwise the variance is fatal. *State* v. *Collins*, 4 N. D. 433, 434. *Ranguth* v. *People*, 186 Ill. 93, 97. *State* v. *DeWolf*, 29 Mont. 415, 420. *Livingston* v. *State*, 16 Tex. App. 652, 656. *Brady* v. *State*, 21 Tex. App. 659, 660. *Alden* v. *State*, 18 Fla. 187, 190. *Washington* v. *State*, 72 Ala. 272, 276. *Reeves* v. *State*, 95 Ala. 31, 41. *Underhill Cr. Ev.* Sec. 286. *People* v. *Van Ewan*, 111 Cal. 144, 147. 7 *Ency. P. & P.* 433, 454. 12 *Ency. P. & P.* 960. 15 *Cyc.* 526.

It is also necessary for the proof to sustain the allegation of the Association's corporate existence, or the variance is fatal. 12 *Ency. Pl. & Pr.* 971. *Alden* v. *State*, 18 Fla. 187, 190.

Both the trial and appellate judges fully concede that the averments of ownership and corporate existence at the time of the alleged offense, are essential both to be made and proved.

The material question is whether the evidence sustains these allegations of the indictment. They hold that it does. We contend that it not only does not sustain them, but affirmatively proves them to be absolutely untrue.

(*b*) The substance of the entire evidence (other than as to corporate existence) in the order in which it was offered to prove the

Association's alleged ownership after the code took affect, and within the statute of limitations, is as follows:

(1) Paper purporting to be an original bill in equity, No. 15907, filed in Supreme Court, D. C., on October 6, 1894, by the Association against the Commercial Alliance Life Ins. Co., a New York corporation, alleging that on August 9, 1894, in pursuance of a prior agreement between them, the Association sold and conveyed to the Company all of the former's property and effects, consisting of its life insurance business and the good will thereof, and all the personal, mixed and real estate then owned by the Association, the said real estate consisting of premises No. 419 Tenth St., N. W., Washington, D. C., and being more particularly described as the N. ½ of Lot 11 in Sq. 378; that the Association conveyed said real estate to the Company by deed duly recorded in the Land Records D. C., in Liber 1937, folio 161; that this sale and conveyance were procured by the Company's false representations as to its financial status; that the Company was to reinsure the Association's policy-holders, to hold the real estate in trust for and subject to prior claims of certain beneficiaries, and to keep and operate an office in this District; and the bill prays for a decree annulling this transfer, and the deed of the real estate, and that the same be reconveyed by the court to the Association (R. 30). (2) Paper purporting to be an order appointing Lipscomb and Fields as receivers of said property, on their qualifying by each giving bond, and requiring the Company and its agents and attorneys to deliver said property to said receivers (R. 31). (3) Paper purporting to be an order directing said receivers to sell said real and personal property, except the books, papers and documents (R. 32). (4) Paper purporting to be receivers' report that they had sold the real and personal property (R. 32). (5) Paper purporting to be an order *nisi* confirming said sale (R. 32). (6) Papers purporting to be orders finally confirming said sale (R. 32). (7) Paper purporting to be a decree of June 27, 1896, annulling said deed, and awarding the entire net proceeds of said sale of said real estate to the payment of the claims of the Association's policy-holders, some of whom had intervened in the cause (R. 33-34). (8) Paper purporting to be an auditor's report of July 31, 1900 (printed in 21 App. D. C. 344, 349), under said decree, finding that

said Association acquired said real estate in the course of its existence; that before or about August 9, 1894, it entered into an agreement with said Company to convey to the latter the personal property, business and good will thereof, and the real estate and all the effects, real, personal and mixed, of said Association; that said Association executed a deed on August 9, 1894, by which it granted and conveyed said real estate to said Company; that said Company paid $14,000 to said Association as the consideration for said deed; that on August 30, 1894, Ball and two others filed their bill in Eq. 15809 against said Association, Lawrence Gardner, and said Company, alleging said agreement and transfer, and that they were a fraud in equity on them and other like policy-holders of the Association; that the Association and Gardner answered this bill, admitting the conveyance of said real estate to said Company by said deed of August 9, 1894; that in the meantime the Association filed said bill in Eq. 15907; that subsequently petitions for leave to intervene were filed by various certificate-holders or creditors of the said complainant Association; that these intervenors distinctly recognized the validity of said transfer by said Association to said Company, and counted on the Company's undertaking to hold the property in trust for their claims under their policies; that said Company purchased the said property, and not the stock, of said Association; that with said $14,000 the Association redeemed and extinguished all of its outstanding stock; that the Association was dissolved prior to October 1, 1894, and "was not an existing corporation; that it was dissolved by the transfer of all of its property, assets and business, and by the fact that there was at that date neither stock of the Association nor stockholders;" that "it follows as a necessary consequence that the corporation was dead"; and said report then awards and distributes the entire proceeds of said sale of said real estate (as "said decree of June 27, 1896, does not include the personalty or its proceeds") to said policy-holders to the extent of $15,090.74 and to said receivers for costs, charges and commissions, to the extent of $9,324.39, to the total exclusion of said Association, which made no claim to any part of said proceeds at any time (R. 35-36). (9) Paper purporting to be an auditor's report of December 7, 1903, redistributing said entire pro-

ceeds to said receivers to the extent of $10,070.82, and to four only of said policy-holders to the extent of $15,876.57, said four being the persons named as owners in the sixth count of the indictment. The auditor made this report under the decision of the Court of Appeals of March 3, 1903 (21 App. D. C. 344), to which he refers, and which he quotes in part, including that part which holds that the other certificate-holders of said Association are entitled beyond question to the remainder of the fund after payment of the Stuart claim (R. 36-37). (10) That the proceeds of the sale of said personalty were paid by said receivers' check drawn to the order of the plaintiff in error, dated August 25, 1900, and payable to him as solicitor for Wm. T. Gilbert, receiver of said Company, for $210 (R. 39). (11) Copy of deed in fee from Bacon and Larner, Trustees, to said Association, dated September 16, 1889, and recorded in Liber 1421, folio 278, purporting to convey said real estate (R. 44). (12) Copy of deed in fee simple from said Association to said Company, dated August 9, 1894, and recorded August 10, 1894, in Liber 1937, folio 141, conveying to said Company the said real estate. With this deed, and as a part of it, there is a certificate by the secretary of said Association that at a special meeting of the stock-holders, after due notice, at the office of the Association, August 9, 1894, a resolution was adopted directing the president to convey in fee simple the title to the said real estate to the said Company for such consideration as he might deem advisable (R. 44-45). (13) Decree and order of distribution of May 5, 1904, confirming said auditor's report (R. 47-48) of December 7, 1903, and directing the distribution of the entire proceeds of said sale of said realty as set out in said report (R. 36). (14) Opinion of Judge Cox, on which said decree of June 27, 1896 (R. 33), was based (10 App. D. C. 316, 343), to the effect that said Association was dissolved on August 9, 1894, by its said sale and transfer on that date to said Company, and by the facts that the said Company bought the property and not the stock of said Association, and that with the said $14,000 purchase money received for its property said Association then redeemed and extinguished all of its outstanding stock; that its said deed of that date to said Company was in equity constructively fraudulent as against creditors of said Association, and for that reason

should be set aside as against them; that said creditors do not proceed on the ground that said deed was fraudulent under Stat. Eliz., and there is no averment that there was express fraud under that statute to cheat and defraud creditors; that there is no such averment in any one of those bills which are consolidated, but they all proceed on the ground of trust; that said deed should be set aside, and the proceeds applied to debts; that the said proceeds of said sale of said real estate belong exclusively to such creditors; that "the corporation [Association] had dissolved itself" on August 9, 1894, and had "vanished into thin air"; that the court has not found it necessary to pass upon the matters in controversy between the two associations, because, without reference to them, *the creditors are entitled to the whole fund as against both companies* (R. 52-53). (15) Opinion of Court of Appeals (10 App. D. C. 316), affirming said decree of June 27, 1896, and adopting said opinion of Judge Cox in full as part of its own opinion, and deciding that said Association's suit in Eq. 15907 against said Company virtually became a creditor's suit by the Association's creditors; that as such it would seem to have been treated by all the parties, and as such certainly it was regarded by the court below at the hearing; that the substantial question in the case is to whom does the fund belong; that if the transaction between the Association and Company was as claimed by the president of said Association, a court of equity could not lend itself to a performance so absurd as would be the restoration of property from the grasp of said Company, as a company, to the possession of the same Company as the sole stockholder and, therefore, entire owner and proprietor of the said Association and of all of its property and franchises; that if the claims of the creditors of said Association shall not exhaust the fund, in that event, *of course any residue undisposed of will go to said Company—not to said vendor Association* (R. 53). (16). Letter of the plaintiff in error of 1904 in which he referred to the same moneys mentioned in the indictment as the "W. B. E. A. money" (R. 53).

This is every line of evidence in the case (other than as to corporate existence) offered to prove the Association's alleged ownership; and at its close we moved the court to direct a verdict of not

guilty because of the failure to show the ownership as alleged, but the court overruled our motion, and we excepted (R. 59, Ex. 34). Then we asked the court to tell the jury to return such verdict on the third count on all the evidence in the case; but this was also denied, and we excepted (R. 59, Ex. 36, Prayer IV). Afterwards the court instructed the jury as follows (R. 61, Prayer XII):

"The jury are instructed, as matter of law, that the first paragraph of the decree of the 27th of June, A. D. 1896, *revested no title to the real estate* that was sold by the receivers, *or to the proceeds thereof, in the Washington Beneficial Endowment Association.*". Yet the court, in the face of this instruction and such conclusive evidence against the Association's ownership as alleged, told the jury (R. 67) that they must find from this evidence, beyond a reasonable doubt, that the Association owned the money.

(*c*) If the deed of August 9, 1894, was in fact procured by the Company's false representations, still the ownership passed absolutely in law and in fact from the Association to the Company. *Shappirio* v. *Goldberg*, 192 U. S. 232, 242; and if the deed was fraudulent as against the vendor Association's creditors, still the ownership so passed. *Luhrs* v. *Hancock*, 181 U. S. 567, 573. The Company took actual possession of the property, which it was ordered to deliver to the receivers (R. 31). The deed was valid *inter partes*, and was based on a valuable consideration—$14,000 paid in cash and certain obligations assumed. Under this deed the ownership vested in the Company, and its title to the land was not divested until the sale and conveyance by the receivers, when it vested in their vendee—*never again in the Association*.. The proceeds of sale merely became the substitute for the property sold, subject to the Company's same ownership, rights and liens. "The effect of the sale by consent was merely to substitute the fund in place of the real estate, and did not change the issues." *Bank* v. *Sheffey*, 140 U. S. 445, 451. "Assets derived from the sale of the * * * corporation * * * property became * * * the substitutes for the things sold, and as such they are subject to the same liabilities and restrictions as the things sold were before the sale and while they remained in the possession of the corporation." *Ry. Co.* v. *Howard*, 7 Wall. 392, 410. The deed was set aside for constructive fraud in equity on the Association creditors, but not for fraud on them under the statutes of Elizabeth. *It was not set aside on behalf of the Association*, nor for

any fraud on it, nor even under its bill, but only on behalf of its creditors and under their pleadings. They distinctly recognized the validity of the deed but counted on the Company's undertaking to hold the property subject to their liens and in trust for their claims. No reconveyance to the Association, either of the property or the proceeds of the sale, was ever made or decreed. The property had been sold and conveyed away by the receivers nearly two years before the deed was set aside by the decree, so that the decree did not, and was not intended to, divest or reinvest or affect the ownership or title to the property itself; but the sole purpose and effect of the decree were to arrest the proceeds of sale in the receivers' hands for the primary benefit of the Association creditors, *but not to confer any ownership thereof on the Association,* nor to divest the general ownership thereof out of the Company, nor to vest it in the Association. The decree left the entire transaction between the Association and Company perfectly valid and binding as between themselves; but invalidated it only as to the Association creditors, and then only to the extent necessary to satisfy their claims, leaving the whole of any surplus to go to the Company and not to the Association, and the entire proceeds of sale so to go if the creditors of the Association were otherwise satisfied. If the decree reinvested the general ownership in the Association, the surplus, of course, would go to it and not to the Company; but the court decided that it should go to the Company. *Gilbert* v. *Wash. Ben. Endow. Association,* 10 App. D. C. 316, 343. *Gilbert* v. *Ben. Endow. Association,* 21 App. D. C. 344, 367. The Association was absolutely concluded as to any interest in or ownership of the property or proceeds, by the several orders and decrees passed in Eq. 15, 907, from none of which it ever appealed; and it never even so much as claimed any such interest or ownership before the auditor or elsewhere, and was absolutely excluded from the distribution. That the deed, though as to Association creditors constructively fraudulent in equity or fraudulent under the statutes of Elizabeth, was valid and binding between the vendor Association and the vendee Company, and passed the grantor's title and ownership to the grantee, and that the decree setting it aside in behalf of such creditors did not revest any title or ownership in the Association, are points conclusively settled by the case of *Luhrs* v. *Hancock,* 181 U. S. 567, in which the court said (pp. 573, 574):

"It has been held in some jurisdictions that a judgment against a debtor becomes a lien on land fraudulently conveyed by him. In other jurisdictions it has been held otherwise, and this court has held otherwise. *Miller* vs. *Sherry*, 2 Wall. 237, was a creditor's bill to set aside fraudulent conveyances, and a question arose as to the effect of the judgment upon land previously conveyed. The court said: 'The judgment obtained by Mills and Bliss was the elder one, but it was subsequent to the conveyance from Miller to Williams. It is not contended that the judgment was a lien on the premises. The legal title having passed from the judgment debtor before its rendition, by a deed valid as between him and his grantee, it could not have that effect by operation of law.'

"The rule and the reason for it are admirably expressed by *Judge Deady* in *In re Estes*, 3 Fed. Rep. 127, as follows:

" 'In my opinion, the lien of a judgment which is limited by law to the property of or belonging to the debtor at the time of the docketing, does not nor cannot, without doing violence to this language, be held to extend to property previously conveyed by the debtor to another by a deed valid and binding between the parties. A conveyance in fraud of creditors, although declared by the statute to be void as to them, is, nevertheless, valid as between the parties and their representatives, and passes all of the estate of the grantor to the grantee; and a *bona fide* purchaser from such grantee takes such estate, even against the creditors of the fraudulent grantor, purged of the anterior fraud that affected the title. Such a conveyance is not, as has been sometimes supposed, 'utterly void', but it is only so in a qualified sense. Practically it is only voidable, and that at the instance of creditors proceeding in the mode prescribed by law, and even then not as against a *bona fide* purchaser."

The Association never had any right to demand from the receivers the property or proceeds, even if it had satisfied its creditors; but, with the creditors paid, such right abided with the vendee Company, or its receiver Gilbert. It is elementary that a decree setting aside a deed for fraud on creditors vacates it only as to them and only to the extent necessary to satisfy their claims; it remains valid

between the parties and against the world, except creditors. Of course, the grantor cannot set up his own fraud to vacate his deed.

> "No rule of law is more firmly established than that a transfer of property made in fraud of creditors, while void as to them, is binding upon the parties and those in privity with them." 14 *Ency. Law* 273.

Void against creditors means ineffectual against legal process; for the creditor cannot lawfully seize the property conveyed, except by such process; nor can he get any title or lien by a subsequent conveyance from the grantor; and if the creditor take possession under any such subsequent conveyance, he is liable to the fraudulent grantee for conversion. *Id.* 311.

In the case at bar, as we have seen, the Association creditors distinctly recognized the validity of the Association's deed to the Company, and counted on the latter's undertaking to hold the property subject to their claims. When the property was sold by the receivers, the ownership of the proceeds of sale vested instanter in the Company, in which the ownership of the property sold was vested by the Association's deed of August 9, 1894.

By the appointment of receivers in Eq. 15,907 the court simply laid its hands on the property, for ultimate purposes; but it destroyed no ownership or rights, having merely arrested the property to abide future judicial action on conflicting claims. We are not concerned with the question of ownership except as to the Association; for so long as it appears by the evidence that *the Association was not the owner* as alleged in the indictment (R. 1-2), *it is wholly immaterial who was.*

The court instructed the jury that it was necessary for them to find from the evidence beyond a reasonable doubt that the moneys "belonged to and were the property of the Washington Beneficial Endowment Association at the time of the alleged commission of the offense; [and] that said company had, at the time of the alleged conversion, a corporate existence" (R. 60, Prayer X). This was repeated in other prayers. The court also instructed the jury, as we have seen, that the first paragraph of the decree (R. 33) of June 27, 1896, *revested no title to the real estate or its proceeds in the Association.* The proof showed that the Association's ownership passed to the Company by the transfer and deed of August 9, 1894, and there was no room to deny this; and so the first paragraph of the

decree was offered to prove that by it the Association reacquired its ownership. On its face, it is futile for any such purpose; but the court told the jury so in terms (R. 61, Prayer XII).

The instructions given by the trial court will be regarded as the law of the case in testing the sufficiency of the evidence to support the verdict. 2 *Cyc.* 725. The appellate court, as a matter of law, will reverse a judgment based on a verdict unsupported by any legal, competent evidence; and the question of the insufficiency of the evidence to support a verdict is properly raised and presented as one of law. 3 *Cyc.* 351.

(*d*) As to the ownership, Judge Cox, after considering the sale and conveyance by the Association to the Commercial Alliance Company of August 9, 1894, and the effect of the Association paying the received consideration of $14,000 to its stockholders in extinguishment of all its outstanding stock said: "I have not found it necessary to pass upon the matters in controversp between the two associations, because, without reference to them, the creditors are entitled to the whole fund as against both companies." Opinion of Judge Cox in *Gilbert* v. *Endowment Asso.*, 10 App. D. C. 316, 365.

The Court of Appeals, in 1897, in *Gilbert* v. *Endowment Association*, 10 App. D. C. 316, affirmed Judge Cox's opinion and decree in full, and adopted (p. 343) his opinion as part of its own. The court specifically held that the deed could not have been set aside on the bill of the Association, but that it was properly vacated on the pleadings of the intervening creditors. On this point the court said (p. 338):

> "But if the fact be, as claimed by the president of the Association in his testimony and elsewhere in the record, that the Commercial Alliance Company had become the owner of all the stock of the Endowment Association, a court of equity could not lend itself to a performance so absurd as would be the restoration of property from the grasp of the Commercial Alliance Company, as a company, to the possession of the same Commercial Alliance Company as the sole stockholder, and therefore the entire owner and proprietor of the Endowment Association and of all its property and franchises. * * * The suit, therefore, has virtually become a suit by creditors and certificate holders to reach the assets of an insolvent corporation for the satisfaction of their claims. As such, it would seem to have been treat-

> ed by all the parties; and as such certainly it was regarded by the court below at the hearing. * * * The substantial question in this case is—to whom does the fund in court equitably and justly belong? The pleadings and the testimony fairly present that question."

The court then considers this question and decides as Judge Cox did,—that it belongs exclusively to the creditors, regardless of the matters in controversy between the Association and the Commercial Alliance Company.

The court expressly held that the deed was not set aside in behalf of the Association, but that, as between it and the Commercial Alliance Company, it remained perfectly valid, so that any residue, after satisfaction of creditors, would go to the Commercial Alliance Company and not the Association. Of course, if the effect of the decree of June 27, 1896, was to revest any title or ownership in the Association, such residue would go to it, and not to the Commercial Alliance Company. This same result would necessarily follow if the deed of August 9, 1894, from the Association to the Commercial Alliance Company did not pass the former's title to the latter. On this point the court said (p. 343):

> "In the event that it shall be found that the claims of the creditors and certificate holders did not exhaust the fund in the hands of the receivers or the assets of the Association * * * of course any residue undisposed of would go to the Commercial Alliance Company, and it would be of no consequence whether it would so go because that Company had become the sole owner of the stock of the Association, or because on general principles of equity it should so go."

In *Gilbert* v. *Endowment Association*, 21 App. D. C. 324, the court, in March, 1903, considered the auditor's report (printed in 21 App. D. C. 349) of July 31, 1900 (R. 35-36), and found that the only error in it was that the auditor had not allowed the Stuart claim in full; and for this reason alone the decree of the court below which confirmed this report was reversed, and the cause remanded for readjudication in this respect. The opinion in 10 App. D. C. 316 was expressly affirmed *in toto*.

Regarding the ownership of the balance of the fund, and the cor-

porate existence of the Beneficial Endowment Association, the court said (p. 367):

> "That they [the other certificate holders] are entitled to a distribution among them of the remainder of the assets of the Association, after the payment of the Stuart claim, we regard as beyond question. It has been held that the Commercial Alliance Company is not entitled to participate in any distribution until the certificate holders are satisfied. • • • There is nothing for the Endowment Association, for it is hopelessly insolvent, and has gone out of existence."

If those decisions were right, then this judgment must be wrong; but they were dismissed by the trial court with the comment that "it makes no difference what another court has decided in another case." This case was tried on four counts, and the evidence was received under all; but while it went to the jury on only one count none of the evidence totally inadmissible under that count was eliminated; and hence the bill of exceptions states the substance of all the evidence under all the counts; and with it all combined, the Association's alleged ownership is not only unproved but shown to be unprovable under any conceivable circumstances.

Could the Association have recovered the land or the proceeds of sale by civil action, on such evidence of its ownership as we have here? Clearly not; yet a mere preponderance of proof is sufficient in such an action.

Let us repeat that the evidence offered by the Government in this case proved affirmatively and beyond any question both that the money did not belong to the Association at any time after January 1, 1902, and that the Association did not have any corporate existence after that date,—in fact, that both such ownership and corporate existence ceased absolutely on August 9, 1894; yet this verdict and judgment find the very contrary.

The opinions in 10 App. D. C. 316 and 21 App. D. C. 344, including those of Judge Cox and Auditor Payne, show that they were based upon an exhaustive investigation of the law and facts relating to the Association's alleged ownership and corporate existence; and we think they must be accepted as final; especially so, as against the superficial rulings in this case, and the evidence offered.

"There was no question that such was the fact, and it was error to submit the matter to the jury to find some other fact not supported by any evidence. * * * This, as we have said, there was not the slightest evidence of, and it was error to submit that question to the jury. * * * The court should have, therefore, directed a verdict of not guilty on those counts." *Burton* vs. *U. S.*, 196 U. S. 283, 298, 301.

The trial court should have granted our motion (R.59, Ex. 34) and prayers (R. 59, Ex. 35, Prayer 1; R. 59, Ex. 36, Prayer IV) for a verdict of not guilty on this third count, for failure to prove the ownership as alleged, if for no other reason.

The evidence proved that the Association's ownership ceased absolutely on August 9, 1894; that it then passed to the Company; then to Gilbert, its receiver; and then, under the annulment decree of June 27, 1896, in part to the four creditors named as the owners in the sixth count of the indictment, who were judicially and finally declared entitled to all that was not awarded to the receivers, and who ultimately received it as the owners.

(*c*) The sum stated in the indictment is a mere paper balance of the gross fund of $24,415.13 plus $1,532.26 (R. 36), less the $10,070.82 decreed to the receivers (R. 36)). There was no actual segregation of the money. Beyond any question, the proceeds ($210) of the sale of the personalty, which were not affected by the annulment decree, belonged to and were properly paid to Gilbert (R. 39); and from the time the receivers were awarded the $10,070.82 for commissions, costs and charges, they became part owners of the gross fund jointly with the four creditors to whom the balance was decreed. It therefore follows that the plaintiff in error was a joint owner of this fund from a date prior to the code; and even if the Association were the other owner, he is not liable under section 841, for it requires the money to be, and it is elementary law that it must be, wholly and exclusively the property or estate of another than the accused. *McElroy* v. *People*, 202 Ill. 473, 474. *State* v. *Kent*, 22 Minn. 41, 42. *State* v. *Riddick*, 2 S. Dak. 124, 125. 10 *Am. & Eng. Ency. Law* 985, 986. 15 *Cyc.* 492, 493. Many other authorities to this point are referred to in those cited.

The ownership of the four distributees, when they were ascertained (R. 36-37, 48) related back to the annulment decree of June

27, 1896 (R. 33), by which the net proceeds of the real estate were awarded to the creditors of the Association.

(*f*) The appellate judge says (R. 80) that "the conveyance of the property having been annulled, the legal ownership of the same and its proceeds *remained* in the Endowment Association until a distribution thereof among its creditors or beneficiaries could be determined and carried into effect. That the fund may have been finally ordered to be distributed, after the alleged date of its appropriation by the receivers to their own use, or that it may hereafter be, upon final settlement of the litigation, can have no effect upon that ownership, which was then in the Endowment Association *for all the purposes of this case.*"

This simply ignores the inexorable effect of the evidence, overrules the prior decisions, and replaces them with an arbitrary declaration of the Association's ownership "for all the purposes of *this* case." Neither the Government nor the accused was a creditor of the Association, and its deed was not void nor vacated as to either of them, but only as to the Association's creditors. It was valid as to all other parties, and for all the purposes of this case.

Surely, the legal ownership of both the property and its proceeds did not remain in the Association. It could not own both. In law and in fact it had neither, after August 9, 1894. When the four distributees were ascertained, their ownership related back to the annulment decree, as we have said, and wherever the ownership of the net proceeds was at that date, it then passed to them, and did not remain where it was until the distribution was carried into effect.

The very statement by the appellate judge of his reasons for holding the Association the owner "for all the purposes of this case", shows their utter weakness and fallacy. The holding is simply arbitrary, for the failure of the evidence to prove the ownership as alleged was too patent to be rationally explained away. The trial judge did not even attempt to do so; but up to the time he gave his general charge to the jury, he said that the whole subject of the pleading and proof of the ownership was utterly immaterial in this case, and that it made no difference whatever who was the owner.

The date of the final order of distribution of the money was May 5, 1904 (R. 48), and "the alleged date of its appropriation" was Nov. 23, 1903 (R. 1-2); but the date of the Association's conveyance to

the Company was August 9, 1894 (R. 30, 35, 44, 45), and that of the annulment decree was June 27, 1896 (R. 33).

No case can be found to support the proposition that the decree vacating the deed only in behalf of creditors operated a reconveyance to the vendor Association, or caused the ownership to remain in it "for all the purposes of this case"; and this decree is neither of itself a conveyance nor does it direct one. Judge Cox said in terms that there was no actual fraud in that deed, but only constructive fraud in equity. The creditors admitted the validity of the deed, but asked that the vendee be decreed a trustee of the property for their benefit (R. 35), and this was the sole purpose and effect of the decree, notwithstanding it was worded in the form of annulment. How could any residue go to the vendee Company, if the ownership either remained in or returned to the vendor Association, as was directly declared as to such residue in 10 App. D. C. 316 and 21 App. D. C. 344? The creditors did not at all proceed under the statutes of Elizabeth; but even if so, the ownership passed and any residue would go to the vendee, notwithstanding a decree vacating the deed for creditors, even as utterly void. The trial court ruled (R. 61, Pr. XII) that the decree did not operate a reconveyance of the land or its proceeds. It was not contended in the trial court that the deed was inoperative to pass title, but only that the decree revested it in the vendor, which contention that court expressly denied. We find nothing in the evidence or the law, or the previous decisions of the courts below, to the effect that the ownership remained in or reverted to the Association "for all the purposes of this case", which arose nine years afterwards, and requires proof of the general, legal ownership of the money in the Association. The equity suits have been finally settled and closed, and the money has been paid to the distributees, as ordered by that court.

Of course, the order (R. 31) appointing receivers in no manner affected the ownership. In *Union Bank* v. *Bank of Kansas*, 136 U. S. 223, this court said (p. 236):

> "A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; and the utmost effect of his appointment is to put the property into his custody as an officer of the court for the benefit of the party ultimately proved to

be entitled, but not to change the title, or even the right of possession, in the property."

In *Great Western Co. v. Harris*, 198 U. S. 561, the court said (p. 576):

> "The ordinary chancery receiver, such as we have in this case, is clothed with no estate in the property, but is a mere custodian of it for the court; and by special authority may become an officer of the court to effect a sale of the property, if that be deemed necessary for the benefit of the parties concerned."

It is as novel as it is senseless to hold that a vendor, whose deed is vacated in behalf of his creditors for constructive fraud in equity as against them, to whom the entire net proceeds of the property are awarded to satisfy their claims, thereby re-acquires his ownership, or it remains in him; but this is the holding of the appellate judge "for all the purposes of this case."

It is quite certain that if this conviction had been based upon some other count of the indictment, the Association would not have been held to be either the owner or a body corporate, but the owner named in such other count would have been promptly held to be such "for all the purposes of this case".

(2) Association Was Not a Body Corporate.

(A) The Pleading.

The allegation of the indictment (R. 2) that the Association was "a body corporate", was essential. The rule is that if the alleged owner be a corporation, the indictment must so aver. *Wallace* v. *People*, 63 Ill. 451, 452. *People* v. *Bogart*, 36 Cal. 245, 248. *Edmonds* v. *State*, 87 Ala. 12, 13. *Thurmond* v. *State*, 30 Tex. App. 539, 540. *White* v. *State*, 24 Tex. App. 231, 233.

Another rule is that the ownership must be laid in an existing person, otherwise it cannot be sustained; for a dead person cannot own property. If the death appear from the indictment, demurrer or motion in arrest will lie; and if it appears by the proof, the variance is fatal. 12 *Ency. Pl. & Pr.* 971.

(B) THE PROOF.

The appellate judge admits (R. 80) that under the allegations of the indictment it was necessary to prove that the Association, the alleged owner of the fund, was a body corporate. He also concedes (R. 80) that there were "some irregularities" in the proof of the articles of incorporation, but refrains from its discussion, as it would require some space. Though confessing that said proof was inadmissible, and though it is elementary that the admitting of incompetent evidence over objection is cause for reversal, he says nothing as to the effect of the trial court's erroneous actions in this respect. Except for the incompetent evidence of *de jure* incorporation, and the remarkable charge (R. 67-68) of the trial judge on this subject, no jury could have found from the other proof that the Association was a *de facto* corporation after August 9, 1894. "It is elementary that the admission of illegal evidence over objection necessitates reversal." *Waldron* v. *Waldron*, 156 U. S. 361, 380. Who can say that this illegal evidence and the charge concerning it were not prejudicial to the accused?

The trial court instructed the jury (R. 60, Prayer X) to acquit unless they found from the evidence beyond a reasonable doubt that the Association "had, at the time of the alleged conversion, a corporate existence". This was repeated in other prayers (R. 60, Prayer VII A; R. 61, Prayer XI); but by the charge (R. 67-68) the court destroyed these prayers by telling the jury in effect that the Association had such corporate existence.

We contend that there is no legal evidence in this case to show that the Association ever was a corporation either *de jure* or *de facto;* but if we err in this, then we insist that the evidence shows that it was dissolved on August 9, 1894, and has never since been "a body corporate", nor "had, at the time of the alleged conversion, a corporate existence." The Government first attempted to prove that the Association was an existing *de facto* corporation on November 23, 1903, the date alleged in the indictment; but this was abortive, as it did not reach after the year 1894. The prosecution then abandoned this attempt, and tried to show that it was an existing *de jure* corporation on said date, but with no better success.

(a) The *de facto* proof was: *Dr. Young* (R. 37): "I know nothing of the organization as a corporation."

Eckloff (R. 41): Knew that there was such an Association here at one time; does not know that it existed in November, 1902; knows that it did business at one time; knew Gardner, its president; never had a policy, but paid other persons' premiums to Gardner for them; it first did business on F Street, and he believes it moved to 419 10th Street, N. W.; it was in 1879 or 1880 when he was there and knew it was doing business, and when he met Gardner, whom he has not met since; does not know when it ceased business, but understood it had ceased; does not know Gardner is dead. *Dr. Donaldson* (R. 44): The Association was incorporated in 1873; he was ont of the incorporators, and was president of it for about twelve years; there was a secretary and treasurer; it first met in Gardner's studio, and then on Tenth street where the building was that it occupied until its *dissolution;* it carried on life insurance business; he ceased to be president about three or four years before its *dissolution*; it was closed up and went out of business about 1893; it has not carried on any business since 1893 to his knowledge. *Edson* (R. 54): Was connected with the Association as a stockholder and policy-holder at the time it failed, which was in 1894; it was then doing business on Tenth street near the gas office; it ceased to do business in 1894; since 1894 it has not carried on any business here or elsewhere.

That this proof is wholly insufficient to show that the Association was a *de facto* corporation at any time, is clearly shown by *Baptist Church* v. *Ry. Co.*, 4 Mackey 43, 47, under the same general incorporation act, in which the court notes (p. 47) the "manifest difference between a special act of incorporation and a general act of incorporation such as we have in force here", and states the essentials of proof of *de facto* existence under each.

If the testimony proved a *de facto* corporation, it did not prove its existence after 1894; but the charge of the indictment is that it was "a body corporate" on November 23, 1903—eleven years later. Proof that a company has a president, secretary or treasurer, does not raise a presumption of its incorporation, because voluntary associations may, and constantly do, act through such officers. The proof was wholly insufficient in law to show a *de facto* corporation existing on November 23, 1903. 10 *Cyc.* 253, 256.

In *Baptist Church* v. *Ry. Co.*, 4 Mackey 43, *supra*, speaking of the proof of a *de facto* corporation under a special act, the late Judge Cox said (p. 47):

> "It would not be sufficient to show a charter to certain persons which required certain acts to be performed in order to amount to an organization under the charter, without going farther. Nor would it be sufficient to show that any body of men had simply called themselves a corporation and assumed to act as such, without showing a charter."

Directly in point as to the proof under the same general incorporation act in the case at bar, he further said (p. 47):

> "Where there is a general incorporation act, it would be equally insufficient for any body of men to show that they had simply been acting as a corporation, without going farther and showing some authority to do so. Nor would it be sufficient in addition to show or to offer in evidence, or invite attention simply to the fact that a general act of incorporation was in force in the jurisdiction. It would be necessary farther to show that that general act of incorporation had become a special charter of these individuals in some way or other in order to make out a case of incorporation *de facto*. In order to do that, it is necessary to show some steps taken towards an organization under the general incorporation act."

(*b*) The *de jure* evidence was: *Pinchback* (R. 41): Is employed in office of recorder of deeds; produces a book from said office called Acts of Incorporation No. 2; folio 165 thereof purports to be a record of a certificate of incorporation of the Association; this record was offered in evidence (R. 42), ***but was ruled out***; a certified copy of said record was then offered (R. 42), ***but was also ruled out***; he had searched for the original certificate in the files where it ought to be kept, but could not find it; a series of books was in said office, called Acts of Incorporation; he has been in said office since November, 1891, off and on. *Schayer* (R. 42): Was in recorder of deeds office for thirty years; a series of libers was kept there, called Acts of Incorporation, under act of Congress; the custom was to record all certi-

ficates, whether required by law to be recorded *or not*, and then to return them to the persons who brought there the record receipts; a ruling of the office required them to be recorded; he knows the handwriting of the copyist who made said liber copy of said certificate; said copyist is dead; it was the duty of the assistant clerk to make this copy in said liber and compare it with the original. *Recital of Bill* in Eq. 15907 (R. 30): Association is a corporation, and was duly incorporated under the laws of the District of Columbia on April 2, 1877, for the purpose of carrying on the business of life insurance; and that a copy of the certificate of incorporation is attached to and made a part of its bill, as is also a copy of the certificate of endowment issued by the said complainant to the insured. *Statement of United States Attorney* (R. 42): The original certificate of Association's incorporation was lost, diligent search had been made for it, but it could not be found (*he had it in his own possession at the time*, R. 21-23). He then offered the said liber copy "as secondary evidence of the original" (R. 42), saying (R. 43): "Remember, we are not offering the record as a record that is required to be kept by law." The court admitted it over our objection (R. 43, Ex. 16) that no proper foundation for secondary evidence had been laid, that the loss of the original had not been proved, that the execution of the original had not been proved, and that said copy does not prove the execution of the original. Said copy appears in full in the record (R. 43-44), and purports to be attested by a witness S. C. Mills.

Pinchback's testimony proves nothing; Schayer's was incompetent, and proves less; the United States Attorney's statement was erroneous (R. 23, 26), and was taken as proof though unsworn; the recitals of the bill in equity were not evidence against us of the facts or conclusions recited; the liber copy was not admissible as secondary evidence on any such showing. At the close of all the Government's evidence we moved the court (R. 43, Ex. 28) to strike out all of this secondary evidence, but our motion was denied.

The record was not primary evidence, for no law authorized the certificate to be recorded in said office. *R. S. D. C.* Sec. 553, *U. S. Ry. Co.* v. *Reed*, 80 Fed. 234, 236 (C. C. A.). 17 *Cyc.* 315, 316, 334. *Fifth Bap. Ch.* v. *Ry. Co.*, 4 Mackey 43, 48. *Wigmore Ev.*, Sec. 1649. *Lloyd* v. *Simons*, 90 Minn. 237, 243.

No foundation for secondary evidence was laid. The copy was not shown to be a true copy; the existence of the original was not proved; its execution was not shown; its loss was not proved; not a word of evidence was given to show search for it in any proper place; the attesting witness was not called nor accounted for; his handwriting was not proved; the United States Attorney's statement that the original had been lost and that diligent search had been made for it and that it could not be found was erroneous, for at that very time he had the original in his own possession, and had so had it for about two months (R. 22-23). Every rule relating to secondary evidence was broken. "A party will not be allowed to give secondary evidence of the contents of original papers in his possession". 17 *Cyc.* 567. Proof of the due executilon, existence and genuineness of the original instrument is an essential prerequisite to secondary evidence of the contents thereof. 17 *Cyc.* 536. Attested instrument must be proved by the subscribing witness, if available, or by proof of his handwriting, and other evidence, if not. 17 *Cyc.* 431. If the original had been produced here, the Government would have been bound to prove its execution and genuineness. Its mere production would not prove it. In *Clark* v. *Courtney*, 5 Pet. 344, 345, the court said:

> "In the ordinary course of legal proceedings, instruments under seal, purporting to be executed in the presence of a witness, must be proved by the testimony of the subscribing witness, or his absence sufficiently accounted for. * * *
>
> "The rule was not complied with in the case at bar. The original instrument was not produced at the trial, nor the subscribing witnesses; and their non-production was not accounted for. * * * It is said that the conduct of the parties amounted to a waiver of the due proof of the original. We are of opinion that the production of the original was under the circumstances dispensed with by the parties, and that a copy of it was impliedly assented to as a substitute for the original. But we do not think that the implication goes farther, and dispenses with the ordinary proof of the due execution of the original, in the same manner as if the original were present."

Of course, there must always be full proof of the loss of the original, before secondary evidence can be received. The subject is fully discussed in 17 *Cyc.* 465-567.

When we called the trial judge's attention to the fact, on our motion for new trial (R. 23), that the U. S. Attorney had the original in his possession when he made the statement as to its loss, the diligent search for it, and the inability to find it (R. 42), and contended that the secondary evidence should not have been admitted, he replied that "the error in admitting the secondary evidence was cured by the fact that at the time the United States Attorney had the original in his possession." For this action of the prosecutor, our motion for new trial (R. 20-24) is, in this respect, reviewable on appeal, being an exception to the general rule that such a motion cannot be reviewed. *Kelly* v. *Moore,* 22 App. D. C. 9, 29, and cases therein cited.

The proper proof of a *de jure* corporation is stated in Judge Thompson's article on corporations in 10 *Cyc.* 219, 235, as well as in his Commentaries. We do not think that the evidence in this case, all of which is fully recited in the bill of exceptions, proved that the Association was either a *de facto* or *de jure* corporation in existence on November 23, 1903, or any other date.

(*c*) Conceding, however, that it was duly incorporated as recited in the bill in Eq. 15907, then the evidence shows that it was legally dissolved on August 9, 1894. It clearly appears that on August 9, 1894, the Association, by the unanimous consent of all of its stockholders, sold and conveyed away absolutely all of its assets and business; that it then voluntarily, totally and intentionally ceased its business, and abandoned its franchise, and the object or purpose for which it was incorporated; that with the purchase money it then redeemed and extinguished every share of its stock outstanding; that it was hopelessly insolvent; that it has never since carried on business here or elsewhere, nor used its franchise; that it intended to dissolve; that it has never since had any stockholders or officers; that it lost its capacity to sustain itself by a new election of officers, as that power was gone, and it could not act until the deficiency was supplied; that by these acts *in pais* it voluntarily surrendered its franchise; and that it lost all of its members. What more is needed to effect a dissolution both *de jure* and *de facto*? Nothing, by the settled law.

Yet the trial judge charged the jury (R. 68) that "judicial proceedings" were necessary to the dissolution of this corporation.

We have only to examine the general incorporation act, *R. S. D. C.* Secs. 553-593, to see how completely the corporation dissolved itself. Judicial proceedings were not required. The statute made the stockholders the constituent element of the corporation; without them there could be no trustees, who must themselves be stockholders, and be elected by the stockholders, and manage the stock, property and concerns of the company; nor could there be a president, who must be designated from the trustees; nor any power to mortgage or give any lien on the corporation property—in short, no power whatever to carry out the object or purpose for which the corporation was organized. The very life of the corporation depended on the existence of stockholders; and when there ceased to be any stockholders, the corporation itself necessarily ceased, too, beyond the power of resuscitation. "The test by which to determine whether a corporation is dissolved for all purposes has been said to be to consider whether it has lost its capacity to sustain itself by a new election of officers .* * * If, however, the power is gone, and it cannot act until the deficiency is supplied, *the corporation is dissolved.* This is not a forfeiture for non-user, but is a consequence of law. 10 *Cyc.* 1270. A corporation may be dissolved in at least five ways (the charge (R. 68) says only one): (1) By expiration of charter term, (2) by act of the legislature, (3) by surrender of its franchise (voluntary dissolution), (4) by loss of all its members or an integral part thereof, and (5) by judicial proceeding. 10 *Cyc.* 1270. A private corporation may dissolve itself without the consent of the sovereignty, by surrender of its franchise and voluntary dissolution. 5 *Thomp. Corp.* Secs. 6680-6688. "An abandonment or surrender by the corporation of its franchise is a question both of fact and intent, and undoubtedly such an abandonment may be proved by acts as well as by words." *Id.* Sec. 6659.

> "A surrender may be made by acts *in pais* as well as by a formal proceeding for that purpose; and it may be concluded, upon abundant authority, that a surrender by a corporation of its charter may be presumed from a neglect, for a long period of time, to choose directors and to exercise the corporate franchises." *Id.* Sec. 6683.

Where a corporation disposed of all of its property, held no meetings for some years, elected no officers, performed no acts, and ceased to have any visible existence, it was held absolutely dissolved without any judicial proceedings for that purpose. *Strickland* v. *Prichard*, 37 Vt. 324, 327. It is well settled (contrary to the charge in our case) that whenever a corporation voluntarily and totally abandons the exercise of its franchises, and does or suffers to be done acts which destroy the end and objects for which it was incorporated, this *ipso facto* works a dissolution both *de jure* and *de facto*, because it must be regarded as equivalent to a direct surrender of its franchises; and in such case "an action in the nature of *quo warranto*, prosecuted by the State, does not, except in form, oust the corporation of its franchises; for it has already abandoned or surrendered them. It does no more than judicially ascertain the fact of the abandonment, and put it beyond all future question." 10 *Cyc.* 1281. Any circumstance or collection of circumstances which creates an incapacity to revive or resuscitate the powers of a corporation, operates in law *ipso facto* a dissolution of it. 10 *Cyc.* 1293. The sale and conveyance by a corporation of all its property works a *de facto* dissolution; but add to this the complete abandonment of its business and franchise, the extinguishment of all its stock, the loss of all its stockholders, members, trustees and other officers, and there is a complete dissolution of a private joint-stock company (as was the Association), both *de facto* and *de jure*.. 10 *Cyc.* 1296. One of the recognized modes by which a private corporation may be dissolved is a voluntary surrender of its franchises, either expressly or by acts which are equivalent. 10 *Cyc.* 1297..

> "It must be obvious that an acceptance by the State of the surrender of corporate franchises is not necessary in the case of corporations created for strictly private purposes and which have not assumed the performance of any public duties, but which do not differ, except in form of organization, from unincorporated joint-stock companies or business partnerships, in the continuation of which the State has no interest; but such a corporation may dissolve itself by the voluntary action of its members without the consent of the State. * * * The law affords no means by which the State can compel a private corporation to remain in existence. * * * A corporation may be dis-

solved by a voluntary surrender of its franchises, evidenced by its mere abandonment and non-user of them, without any formal tender of them to the State or acceptance of them by the State. * * * It is clear upon principle and authority that a corporation may become defunct for all purposes by its own voluntary act, or rather by the voluntary act or neglect of its members, and that it does become defunct for all purposes whenever there has been an abandonment of its franchises, committed under such circumstances, or continued for such a length of time, as renders it morally or legally impossible for it to resume them. * * * A surrender may be made by acts or neglects *in pais* as well as by a formal proceeding for that purpose; and it may be concluded, upon abundant authority, that a surrender by a corporation of its charter may be presumed from a neglect for a long period of time to choose directors and to exercise the corporate franchises." 10 *Cyc.* 1300, 1301.

"Whether a corporation has lost its existence is a fact *in pais*, which may be ascertained in any judicial proceeding, whether the question arises directly or collaterally, whenever its ascertainment becomes necessary for the protection of rights or the redress of wrongs." 10 *Cyc.* 1274.

This is very different from a collateral attack on the legality or regularity of the proceedings by which the corporation was created; for it concedes the creation, but asserts the death of the corporation.

Thus it appears that in every criminal and civil case corporate existence must be averred and proved—beyond a reasonable doubt in criminal cases, and by a preponderance of proof in civil—either *de facto* or *de jure*; and if the evidence shows facts or acts constituting a dissolution in any one of the five (not one) ways recognized by law, the variance is fatal. In case of acts *in pais* creating a dissolution as equivalent to a voluntary surrender, no judical proceedings are necessary to give effect to such voluntary dissolution. To say that a private joint-stock corporation can only be dissolved by judicial proceedings (Charge R. 68) is to ignore four-fifths of the law of corporate dissolution. While corporate creation is not generally open to collateral attack, yet it is always as competent to show corporate dissolution as the death of a natural person; and

this, too, collaterally, as well as directly. Proof of a *de jure* corporation is destroyed by proof of *de jure* dissolution; and proof of a *de facto* corporation is destroyed by proof of a *de facto* or *de jure* dissolution. In this case, the Government's own evidence showed an absolute and complete *de jure* dissolution—corporate death of the Association.

To the five methods of corporate dissolution above stated may be added a sixth, viz: Where by express provision of the charter itself, the omission to perform some act is made to work a forfeiture. *Bywaters* v. *P. & G. N. Ry. Co.*, 73 Tex. 624, 627.

(*d*) The decisions in 10 App. D. C. 316, and 21 App. D. C. 344, held directly and in terms that the Association was dissolved and went out of existence on August 9, 1894. The trial court said that "it makes no difference what another court has decided in another case." The question should be *stare decisis*.

As to the Association's corporate existence Judge Cox, after considering the sale and conveyance by the Association to the Commercial Alliance Company, of August 9, 1894, and the effect of the Association's paying the received consideration of $14,000 to its stockholders in extinguishment of all its outstanding stock, said (R. 52-53).

> "The payment of $14,000 to the stockholders was either a redemption and extinguishment of their stock, or it was a purchase by the Commercial Alliance. I think it must be regarded as the former. * * * Looking at it in that view, then, what was the effect of paying $14,000 to the stockholders? It was a simple extinguishment of the stock. From the moment that money was received they ceased to be stockholders. We know that the old rule of the common law was that the corporation expired upon the death of all its members; and so, also, if the members cease to be members, the corporation must cease, too. There cannot be a stock corporation without stockholders. This was a stock corporation and the trustees had to be elected from the stockholders, and the president elected from the trustees, so that the result of this transaction was that there were no stockholders, trustees or president. * * * *The corporation had dissolved itself. It had vanished into thin air.* The promises of the Commercial Alliance were made to a *mere phantom* and could not be enforced." Opinion of Mr. Justice Cox in *Gil-*

bert vs *Endow. Asso.*, 10 App. D. C. 316, 343, 357, 358, adopted in full by Court of Appeals as part of its own opinion.

On the same subject the auditor said (R. 35-36):

> "I am of the opinion that at the entry of the judgment [of Stuart against the Association on October 1, 1894,] the Beneficial Endowment Association *was not an existing corporation;* that *it was dissolved* by the transfer of all of its property, assets and business, and by the fact that there was at that date neither stock of the Association nor stockholders. * * * I am of the opinion that the stockholders parted with the ownership of the stock on the 9th of August [1894], and, as the Association could not hold it, the inevitable result was its immediate extinguishment. It follows as a necessary consequence that *the corporation was dead.* It could not exercise any corporate function. It could not sue or be sued. No process of any kind could be served upon it. All suits against it abated and with them the suit of Mrs. Stuart. I am reminded that in these consolidated cases the Association has been recognized by the courts as cap pable of suing and being sued. The want of such capacity by the civil death of the corporation was not made manifest to the court until the cases were submitted for adjudication. The condition was only developed in the proof then presented. Then the court had, in the combination of suits, sufficient proper parties, complete pleadings and satisfactory proof to sustain its jurisdiction and decree." Report of Auditor Payne of July 31, 1900, reported in 21 App. D. C., 353, 354, 355. (R. 35-36).

In *Gilbert* v. *Endowment Asso.*, 21 App. D. C. 344, the court considered the auditor's report of July 31, 1900 (R. 35-36, printed in part in 21 App. D. C. 353-355), and held that its only error was in not allowing Stuart's claim priority, and for this error alone the decree confirming it was reversed and the cause remanded for re-audit, in accordance with the opinion of the Court of Appeals. The court said (p. 367):

> "There is nothing for the Endowment Association,

for it is hopelessly insolvent, *and has gone out of existence.*

CIVIL COURTS.

Cox, J. (1896): "The corporation had dissolved itself." Court of Appeals (1897): "The corporation had dissolved itself." Auditor (1900, confirmed by Supreme Court D. C. and Court of Appeals in this respect, 21 App. D. C. 344): "The Beneficial Endowment Association was not [Oct. 1, 1894] and existing corporation. * * * It was dissolved. * * * The corporation was dead." Court of Appeals (March 3, 1903): "The Endowment Association * * * has gone out of existence." (R. 53, 52, 35, 36).

CRIMINAL COURT.

Wright, J. (1905): "If * * * the corporation ever was in existence * * * than it is utterly immaterial whether that corporation was continuing to * * * exercise the function of a corporation so long as it never was formally dissolved by judicial proceedings, concerning which there is no proof." (R. 68).

The evidence in this case showed something more than a mere discontinuance of business, or exercise of corporate function by the Association. The trial court stated but one item (R. 68) of the proof, and then gave judgment that form controls substance—a corporate suicide is not dead until it is judicially pronounced so.

The question of corporate existence or dissolution is one of fact for the jury, under proper instructions from the court. 10 *Cyc.* 1274, 1301, 1357, 1360.

On the evidence in this case, where was the corporation or officer or member who could institute or apply for the judicial proceedings? How could it act? Who could act for it? What interest had the sovereignty in this corporation? By the trial court's rule, perpetual death inexorably gives perpetual life; because it is so dead that it cannot ask a court to say so, therefore it is not dead. A court may as well assume to stay the natural death of a man as that of a private corporation. On the principle of this case, if the ownership had been laid in John Doe, and the evidence had proved that he had parted with his ownership eleven years before, and later

on the same day had died, the verdict and judgment would have been just the same as we now find them, unless it had been shown that John had been formally pronounced dead. Death is not fact, but form, said the trial court.

We have tried to show that "a body corporate" in the indictment is essential to be alleged and proved as laid, and that it has not been proved. The variance is necessarily fatal. Because there was no legal evidence to show the Association's corporate existence as alleged, it was the duty of the court to direct a verdict of acquittal on this third count, as we asked (R. 59, Prayer IV, Ex. 36; R. 59, Prayer I, Ex. 35; R. 59, Motion, Ex. 34).

Book No. 1, Acts of Incorporation, received in evidence over our objection (R. 42, Ex. 15) contained no entry or reference to the Association's incorporation, or to any other issue in this case, and was, therefore, wholly irrelevant; and it was error to overrule our objection to it.

Our prayer XVII (R. 62, Ex. 40) presents the law when any rebuttable presumption conflicts with that of innocence. It was asked with special reference to the presumptions of continuance of ownership and corporate existence, which, in this case, came into conflict with that of innocence. The court refused it, thus leaving the former presumptions in full force to weaken or destroy the effect of the latter. It is well settled law that the presumption of innocence is the highest rebuttable presumption known in criminal procedure, and that it is stronger than, and overcomes, every other rebuttable presumption which comes into conflict with it. It attends the accused throughout the trial, and has relation to every fact that must be established in order to prove his guilt beyond a reasonable doubt. *Kirby* v. *U. S.*, 174 U. S. 47, 55. Every other rebuttable presumption must yield to it. *Davis* v. *U. S.*, 160 U. S. 469, 484 (it overcomes the presumption of sanity in a murder case, the proof being equally balanced). *Com.* v. *Whittaker*, 131 Mass. 224, 225 (seduction). *West* v. *State*, 1 Wis. 209, 215 (seduction). *People* v. *O'Brien*, 130 Cal. 1, 7 (rape). *Green* v. *State*, 21 Fla. 403, 405 (bigamy). *McArthur* v. *State*, 59 Ark. 431, 439, (libel). *People* v. *Roderigas*, 49 Cal. 9, 10 (seduction). *Zabriskie* v. *State*, 43 N. J. L. 640, 642 (seduction). *Powell* v. *Knox*, 16 Ala. 364, 369 (ownership).

Our prayer contains an accurate statement of the law, and should have been granted. The charge (R. 68) told the jury in effect that

the presumption of the continuance of the Association's corporate existence was conclusive, and that of its ownership almost conclusive, thus destroying or weakening the effect of the presumption of innocence with respect to these two essential facts.

(*c*) The appellate judge brushes the foregoing matters aside with the statement (R. 81) that there was "ample evidence" to show that the Association was a *de facto* corporation. He also says that the Association was *de facto* organized and acting as such, and he cites *U. S.* v. *Amedy,* 11 Wheat. 392, 409, to the point that proof of *de jure* or *de facto* incorporation could be made. He also says that the Association's discontinuance of its business, its ceasing to maintain its active organization, or its insolvency, did not cause it to cease to exist, to which he cites *Brown* v. *Cement Co.,* 1 App. D. C. 232, 236. He concedes that it ceased to do business in 1894. He remarks that it was sued and described as a coporation in the equity suit in which the accused was appointed a receiver; and he concludes (R. 81) that "it was and still is a corporation for all the purposes of the equity suit and of this case."

The doctrine of *U. S.* v. *Amedy* is conceded, if the proof shows a *de facto* existence at the very time of the alleged offense, but not, as here, if it merely shows such existence eleven years before, with nothing to show its continued existence, but express decisions to the contrary. Nor is the doctrine of *Brown* v. *Cement Co.* questioned; but here the showing went far beyond mere cessation of business and active organization and insolvency, as appears by 10 Ap. D. C. 316, and 1 App. D. C. 344, and this record. That some person sued in the corporate name, or sued it by such name, does not make or continue it as a corporation, for its dissolution was developed only by the proof. "The condition [of dissolution] was only developed in the proof. * * * Then the court had in the combination of suits sufficient proper parties, complete pleadings, and satisfactory proof to sustain its jurisdiction and decree" (R. 36). This was the approved answer to the very argument now made "that in these consolidated cases the Association has been recognized by the courts as capable of suing and being sued" (R. 36). We cannot see how "it was and still is a corporation for all the purposes of the equity suit and of this case;" nor can we find any such reservation, express or implied, in the former decisions.

If he had been given a chance, is there any doubt that the accused

could have reproduced in this case the same evidence of corporate dissolution that was given and held conclusive in the equity suits?

As if its repudiation of its own former decisions that the Association was dissolved on August 9, 1894, were not sufficient, the court below adds the astounding statement (R. 81) "that the defendant, who held the money by appointment as receiver in the equity suit which recognized the corporation as one *de facto*, at least, and under a decree declaring its ownership of that money for the purposes of the suit, is in no attitude to deny its *de facto* status."

The equity court *did not*, after the proof, recognize the Association as a corporation either *de jure* or *de facto*, but held (R. 53) directly the contrary—*"The corporation had dissolved itself. It had vanished into thin air."*

Again (R. 36-37):

> "The Beneficial Endowment Association was not an existing corporation; * * * it was dissolved * * *. The corporation was dead. It could not exercise any corporate function. It could not sue or be sued. No process of any kind could be served upon it. All suits against it abated."

The Court of Appeals, as we have shown, expressly approved and adopted as its own the language quoted, and said itself that *"the Endowment Association * * * has gone out of existence."*

The decree (R. 33) *did not* declare "its ownership of that money for the purposes of the suit," but both Judge Cox and the Court of Appeals held that the Association's ownership ceased absolutely on August 8, 1894. The decree did declare the ownership of the creditors and receivers, and the fund was finally paid in part to the four creditors named (R. 36) in the sixth count of the indictment, and the balance was awarded absolutely to the receivers themselves (R. 36).

By what earthly reason can the accused be estopped in this case to deny the Association's alleged corporate existence? If estopped why does the court below say (R. 80) that "it was necessary to prove that it * * * was a body corporate"? If estopped as to corporate existence, why not as to ownership and receivership and possession as receiver and fraudulent conversion? Is the mere presentation of the indictment conclusive proof of guilt of the crime alleged, and every element thereof? Can a chancery receiver be estopped to

deny the very fact which the court in the receivership case directly decided, and which decision the appellate court itself affirmed? Both the chancery court and the Court of Appeals held in terms, as we have shown, that the Association was dissolved as a body corporate on August 9, 1904; and we are utterly at loss to conceive any reason why the accused is estopped to deny its corporate existence eleven years later.

We have already noted that a receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed. *Union Bank* v. *Bank of Kansas*, 136 U. S. 223, 236. He is not the agent of any of the parties. By what rational principle can he be estopped, as the court below says he is estopped in this case? The court states none.

It is noticeable that the court below is silent as to what it said in its former decisions concerning the Association's non-ownership and corporate dissolution. Why?

In the trial court, the prosecution entirely abandoned its effort to prove a *de facto* existence of the Association as a body corporate at any time after the code took effect on January 1, 1902, or within the three year period of limitation, but it relied exclusively upon its alleged proof of *de jure* existence. The trial judge nevertheless sent both aspects to the jury, with a practically peremptory charge of corporate existence under each aspect. The appellate judge rejects the *de jure* proof as irregular, and accepts the *de facto* as ample evidence of the Association's corporate existence on November 23, 1903, the date laid in the indictment. The situation is unique, to say the least.

X. THE CONVERSION.

(1) The Pleading.

The indictment (R. 2) charges that the accused came into possession of $15,974.07, and that on Nov. 23, 1903, they "did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby then and there embezzle the same." This is the entire charge of conversion. Is it sufficient?

Suppose this bare charge were set out in a bill in equity for the removal of trustees; would it withstand a demurrer for want of particulars of the fraud and conversion? Suppose it were made in a declaration at law for the recovery of money; would it be good?

Undoubtedly, the modern tendency of trial courts is to strip indictments more and more of the averments tending to inform the accused of the nature and cause of the accusation against him; and many a man has gone to a prison cell on an indictment that would not stand for an instant as a good pleading in a court of law or equity. The nature of the accusation is stated, but the cause is omitted, and the indictment is held sufficient. It is of but little aid to the accused to be informed that he is charged with having fraudulently converted to his own use a certain sum of money on a certain day, without more. What information does this give him of the cause of the accusation, or of the acts or facts which he must be prepared to meet on his trial? That it gives none, but is actually misleading and serves as a trap for the accused, can be seen by examining this indictment (R. 1-2) and then turning to the evidence (R. 38-41) offered and received to prove the alleged conversion

As said before concerning a bill of particulars, there is no statute here dispensing with the particulars of the alleged embezzlement, but there are such statutes in some of the States. Embezzlement is a single act offense. It does not depend upon or consist of a series of acts or a course of conduct. Every act of embezzlement is complete in and of itself, and is separate and distinct from all others, however numerous or analagous in point of time or otherwise they may be. Convenient as it may be to the prosecution to dump *en masse* into the indictment and proof, every act of the accused from the beginning to the end of his fiduciary relation, without any specification, discrimination or election, yet the Constitution forbids, or if not, the rules of law do, and it requires a statute to change them.

Our demurrer (R. 3) points out that the indictment is bad in substance because "no facts or particulars are alleged to show that the defendants have converted or appropriated the alleged money to their own use, either fraudulently or unlawfully or otherwise; but only a mere conclusion is alleged." Our demurrer was overruled (R. 5), and our motion for a bill of particulars (R. 7) was denied.

(*a*) To embezzle is to convert to one's own use fraudulently and feloniously, and *vice versa*. This indictment therefore simply

charges that the accused "embezzled the same", this being stated by way of conclusion from the preceding conclusion of fraudulent conversion, its synonym. The offense is merely averred by name instead of facts, and this form of pleading is clearly bad for generality. It consists only of conclusion, and conclusion upon conclusion.

The charge amounts simply to an averment that the accused embezzled by embezzling, that they fraudulently converted to their own use by fraudulently converting to their own use. This is the effect of a charge that the accused embezzled, that is, committed embezzlement, by fraudulently converting the property to his own use, or a charge that he fraudulently converted it to his own use and thereby embezzled the same; for the terms are synonymous, interchangeable, and convertible, and combined they do not extend the scope of the information given to the accused, beyond that given by either.

In *Com.* v. *Smart*, 6 Gray 15, the indictment alleged that certain property of one Scott (describing it) was intrusted to the defendant to deliver to the said Scott on demand; that afterwards it was demanded of him by the said Scott, and the defendant refused to deliver it, but "embezzled and fraudulently converted it to his own use." This was held fatally defective on motion in arrest. The court said (p. 17):

> "The general charge of embezzlement and felonious appropriation to his own use by a party, of property entrusted to him, is insufficient to constitute a legal and effectual accusation."

In *McCann* v. *U. S.*, 2 Wyo. 257, the charge was that the defendant "feloniously and fraudulently did embezzle" certain sugar of the United States. This was held fatally defective on demurrer, and the court said (p. 286):

> "The count charges the defendant with embezzlement, without alleging its constituent facts; it charges therefore a mere legal conclusion, leaving it impossible to determine whether the offense was committed, and the conclusion correct."

This case was approved in *Moore* v. *U. S.*, 160 U. S. 268, in which the court said (p. 274): "Whether an indictment charging in such general terms that the prisoner 'embezzled' the property of the Gov-

ernment (identifying it), would be sufficient, we do not undertake to determine." Speaking of a charge that the accused "did embezzle the sum of $1,652.59, money of the United States,' the court said (p. 276) that this "generality of description would be clearly bad."

In 7 *Ency. Pl. & Pr.* 439, it is said:

> "Where the indictment sets forth that the property was delivered to the defendant in trust, or for a particular purpose, it is not sufficient to allege merely that the defendant did embezzle, or that he did convert, but the acts of the defendant that were inconsistent with the trust confided to him should be specially set forth."

In *People* v. *Gale*, 77 Cal. 120, 121, the indictment alleged that the defendant as administrator of Polly received $1794, but accounted in his final settlement only for $1700, and so did then and there "fraudulently appropriate to his own use and purpose" $94 of Polly's estate; and it was held (p. 121) that it "does not, in the absence of all averments of other necessary inculpatory facts, constitute the crime of embezzlement."

In 10 *Am. & Eng. Ency. Law* 983, 984, it is said that it must be alleged by way of facts and particulars, not conclusions, that the defendant's dealing with the property constituted a criminally fraudulent conversion of it to his own use.

In *State* v. *Brandt*, 41 Iowa 593, the embezzlement statute (p. 606) applied if any officer "unlawfully convert to his own use in any way whatever." The indictment (p. 596) charged the defendant with unlawfully and feloniously converting the sum of $5000 to his own use, "without stating how or in what manner the money was converted" (p. 611), and it was held fatally defective. The court reviewed numerous cases and said (p. 612):

> "To charge that defendant converted to his own use public money, is charging a legal conclusion rather than a fact. The manner in which the money was converted should be alleged, so that the court may determine whether in legal contemplation there has been an unlawful conversion of the public money or not. To charge that one committed 'murder', or 'robbery', or larceny', would be bad. The facts constituting the crime must be stated. So to charge 'unlawful conver-

sion' of the public moneys is bad, because it is not a statement of the facts composing the offense intended to be charged."

In *State* v. *Griffith*, 45 Kan. 142, the indictment (p. 142) charged that the defendant as bailee "did then and there unlawfully and feloniously embezzle and convert to his own use", certain property, and it was held (p. 145) fatally defective for want of the particulars of the bailment and the conversion. The court cited various cases and said (p. 144):

> "It has generally been held under similar statutes that the indictment, or information, should not merely state the bailment or trust, but should aver the facts and circumstances which made the case embezzlement; and it is also necessary to state the purpose for which the defendant was entrusted with the property."

In *State* v. *Longworth*, 41 Tex. 162, the indictment charged that the defendant as bailee was entrusted with a certain gun to take from one place to another, and that he (p. 163) "did then and there convert to his own use and benefit the said gun," etc. This averment was held (p. 163) to be a mere conclusion, and not to allege any embezzlement. The court said (p. 163) that the indictment "is manifestly uncertain, indefinite, and ambiguous in its averments, and does not charge appellee with any offense in plain and intelligible words."

In *People* v. *Poggie*, 8 Cal. 42, the indictment (p. 43) charged that the defendant as bailee "did feloniously and willfully convert the same to his own use, with the intent to steal the same," and it was held (p. 44) fatally defective. The court said (p. 43):

> "It may then be safely assumed that all conversions of money, or property, by a bailee, are not *ipso facto* unlawful or felonious under our statute. * * * If such is the case, then the character of the bailment, and the mode of conversion, should be distinctly set forth in the indictment."

In *Com.* v. *Fahnestock*, 4 Pa. Dist. Rep. 297, it was charged that the defendant as a broker (p. 298) unlawfully, with intent to defraud, "did convert and appropriate the said $500. to his own use." The statute (p. 298) applied "if any person * * shall * * *

with intent to defraud * * * or in any manner convert to or for his own use, or to the use of any other person", etc. This was held (p. 298) fatally defective without the facts of the alleged conversion.

In *Com.* v. *Hottenstein,* 8 Woodward's Dec. 477, the first count (p. 478) charged that the defendant, as a bank cashier, "then and there unlawfully, fraudulently and willfully did embezzle" certain money. The second count (p. 478) charged that he did "take away and appropriate to his own use and benefit" certain other money. Both counts were quashed (p. 480) "in that their terms are too vague to meet adequately any of the provisions of the" statutes.

In *Territory* v. *Heacock,* 4 N. Mex. 354, the statute (p. 356) applied to any person who "shall embezzle or fraudulently convert to his own use", etc. The indictment (p. 355) charged that the defendant "unlawfully, knowingly, willfully, and fraudulently did embezzle and convert to his own use" certain money. This was held (p. 357) fatally defective, for want of the facts constituting the conversion. The court states the facts of and quotes approvingly from *Com.* v. *Smart,* 6 Gray 15, 16, *supra,* as follows (p. 357):

> "It is among the first and most familiar of the rules of criminal pleading that, in an accusation against a party charged with the commission of an offense, all the facts and circumstances of which it is constituted ought to be specifically stated and set forth. Tried by that rule, the indictment against the defendant is manifestly defective and insufficient. * * * It contains no description of the act complained of."

We have stated *supra* the allegations of the indictment in *Smart's* case. The court then says (p. 357):

> "What was he to do with it, and what did he do that was unlawful? It may be answered, he appropriated the property to his own use unlawfully. If so, the facts which constitute the unlawful appropriation should in any event be averred. The same case [*Smart's*] says [p. 17]: 'The general charge of embezzlement and felonious appropriation to his own use, by a party, of property intrusted to him, is insufficient to constitute a legal and effectual accusation.' These authorities * * * seem conclusive on the point made by the demurrer, and [it] * * * should have been sustained."

In the case at bar, the indictment merely alleges that the defendants as receivers came into possession of $15974.07, and fraudulently converted the same to their own use, and thereby embezzled the same. Not a single inculpatory fact or particular is charged, but only this conclusion of the pleader from non-averred facts or suppositions. The charge is far less complete than that held had in *People* v. *Gale, supra.*. It is a mere statement of the offense in the words of the statute, without any averment of the accompanying facts and circumstances essential to constitute a specific offense. Such a statement must be accompanied with an allegation of such facts and particulars as will inform the accused of the specific offense coming under the general description of the crime with which he is charged, and enable him to prepare for his defense; and also that he may plead his conviction or acquittal in bar of further proceedings. The words of section 841 merely point out the means which give rise to the ultimate act, leaving it to the indictment not merely to repeat its words but to set out the primary and individualizing facts and particulars which constitute the specific offense, as well as each constituent element thereof. What did the accused do to warrant the conclusion that he fraudulently converted the money to his own use, and thereby embezzled it? How did he do it? Is he entitled to be informed of these facts?

> "Embezzlement is a criminal breach of trust; but every breach of trust is not embezzlement. The statutes were not intended to cover every breach of trust, nor every fraudulent breach of trust, and render it a criminal offense. Embezzlement always presents a case of a breach of trust, but every breach of trust is by no means embezzlement." 10 *Ency. Law* 990.
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> "An investment or deposit of trust funds should always bear the impress of the trust, and it is almost universally considered that a fiduciary commits a breach of trust, for which he is liable, where he invests or deposits the funds intrusted to him in his own individual name or to his individual credit, with nothing to show that he holds such investment or deposit in a fiduciary capacity." 17 *Ency. Law* 456. This rule applies even though he acts with perfect good faith and integrity. The liability is generally predicated of the naked fact that there has been a technically unauthorized dealing with the trust fund. *Id. ibid.*

> "Where a fiduciary invests or deposits trust money in his individual name he commits a breach of trust which is practically the same, and subjects him to the same liability, as if there had been a wilful conversion to his own use, or a commingling of the trust funds with his own private funds." 17 *Ency. Law* 457; and see *id.* pp. 459-460.

These quotations show how intensely vital it is that the indictment shall state the very acts, facts and particulars of the alleged fraud and conversion; for the fiduciaries' acts may be technically fraudulent conversions, but at the same time absolutely non-criminal under the statute. Let us have the facts, so that we may know whether we are to meet a civil or a criminal charge.

(*b*) Under section 841, the general words "fraudulently convert or appropriate to his own use", would include a case where one, in legal contemplation, converted money or other property to his own use, but in perfect good faith and honesty in fact, and without the slightest intent to defraud in fact, but also under circumstances which the law declares to be technically fraudulent. The statute does not apply to such a fraudulent conversion, for the criminal intent to defraud in fact is lacking. What constitutes fraud or converting or appropriating to one's own use or embezzlement is a question of law to be determined from the specific facts or acts which are claimed to constitute each or all. Sec. 841 covers only criminal fraud in fact, as contra-distinguished from technical fraud in law. There are so many things that a fiduciary may do innocently but which may technically be a fraudulent conversion or appropriation to his own use, or which at least may be claimed to be such by others, that it is essential that the very acts, facts and particulars shall be distinctly set out in an indictment against him for embezzlement, and especially those on which is based the conclusion of fraudulent conversion and embezzlement, so that the court may see that the pleader's conclusion is correct, or quash the indictment if it is incorrect, and so that the accused may know just what he must meet. The constitutional provision that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation against him, demands something more than a mere general charge; nature and cause are not here synonymous, but the former means the general character of the charge—for example, larceny, forgery, mur-

der, libel, embezzlement—while the latter means the particulars, the precise facts and acts on which the charge is based; or, otherwise stated, *both a charge and a specification are required.* Even court-martial proceedings demand this much. This indictment gives the general charge, but omits the specification.

The words of section 841, by their generality, may embrace cases which fall within the terms but not within the spirit or meaning thereof. Clearly it would include in its terms a case of technically fraudulent conversion by a fiduciary, where the act was done in perfect good faith, such as an investment made or a bank account opened in his individual name, either inadvertently or by the fault of others. Therefore the specific facts must be alleged to bring the defendant precisely within the inhibition of the law. 10 *Ency. P. & P.* 487. *Com.* v. *Barrett,* 109 Mass. 302, 303. *U. S.* v. *Johnson,* 26 App. D. C. 136, 139.

An act may be fraudulent in law but innocent in fact. The law requires a criminally fraudulent intent in fact. "Unlawfully" suggests nothing fraudulent or criminal. "Fraudulently" suggests both fraud in fact and fraud in law. All criminal acts are fraudulent, *but all fraudulent acts are not criminal.* Hence, the indictment must directly charge fraud in fact, and thus exclude mere fraud in law. Sec. 841 is not directed against unlawful conversion, but only against conversion criminally fraudulent in fact. To charge that one fraudulently converted does not necessarily mean that he converted with an actual, felonious intent to defraud in fact; for the charge may refer to a conversion in legal contemplation and technically fraudulent. Fraudulent conversion is one thing; but conversion with felonious intent to defraud is quite another and different. Proof that one converted to his own use by an act technically fraudulent is not sufficient to support a charge of embezzlement; but actual, felonious, criminal fraud in fact is essential both to be alleged and proved under all indictments for this offense.

The criminal intent is the all-controlling element and distinguishing feature of criminal law; it is the very life and spirit of penal procedure; without it, the act is not criminal.

The bare allegation that one fraudulently converted to his own use merely charges, by way of conclusion, that he converted by an act fraudulent in law, but not *vi ex termini* in fact. It states no fraud, at all; and it does not charge embezzlement.

In *U. S.* v. *Watkins,* 3 Cranch C. C. 441, decided by the Circuit Court of the District of Columbia in 1829, the defendant was indicted for devising and intending fraudulently to obtain for his private use moneys of the United States by certain false pretenses particularly stated. There were three indictments found against him, and objections were taken to the sufficiency of their allegations of fraud. In considering the objections, the court said (p. 477):

> "Fraud is an inference of law from certain facts. A fraud, therefore, is not sufficiently set forth in an indictment, unless all the facts are averred which in law constitute the fraud. Whether an act be done fraudulently or not is a question of law so far as the moral character of the act is involved. To aver that the act is fraudulently done is, therefore, so far as the guilt or the innocence of the act is concerned, to aver a matter of law, and not a matter of fact. An averment that the act was done with intent to commit a fraud is equivalent to an averment that the act was done fraudulently. No epithets, no averment of fraudulent intent, can supply the place of an averment of the fact or facts from which the legal inference of fraud is to be drawn. *Starkey,* in his late treatise on criminal pleading, in p. 163, says: 'Whether particular circumstances constitute an indictable fraud is a question of law; and, therefore, according to a fundamental rule of description in indictments, such circumstances must be set out in order to show that the facts amount to an indictable offense.'"

In *Evans* v. *U. S.,* 153 U. S. 584, 594, the court said that "it is entirely true that an allegation of fraud is insufficient, either in an indictment or a bill in equity, without giving the particulars of the fraud." *U. S.* v. *Atherton,* 102 U. S. 372, 374, is to the same effect. "In pleading fraud either at law or in equity, it is a well settled rule that the facts must be stated in the declaration or petition, not conclusions." 20 *Cyc.* 96. In 16 *Cyc.* 231, the rule is laid down as follows:

> "A bill seeking relief on the ground of fraud must distinctly and specifically charge the fraud. *It must state the specific facts and circumstances constituting the fraud,* and the facts stated must be sufficient in

themselves to show that the conduct complained of was fraudulent. General charges of fraud, or that acts were fraudulently committed, are of no avail, unaccompanied by statements of specific facts amounting to fraud."

In a bill in equity is a charge that the defendant fraudulently converted the trust fund to his own use, sufficient without more? If not, why should it be sufficient in an indictment for an infamous crime? Trial courts in large cities have gotten so deeply into the rut of sustaining all indictments, and presuming the guilt of all defendants, and proceeding to convict them as a matter of course, that it is difficult to get them to give pause sufficient to note that any particular case is not within their rigid rule of conviction at any cost. The accused is informed merely of the nature of the charge—that he is charged with larceny or libel—but that is all sufficient for their purpose of conviction. It has been truly said:

"How use doth breed a habit in a man."

(c) The general essentials of indictments are well settled, and but little more than their mere statement is required to show that the indictment in this case is fatally defective in more respects than one.

The Sixth Amendment provides that "in all criminal prosecutions the accused shall enjoy the right * * * to be informed of the nature *and cause* of the accusation against him." It is this provision that requires absolute certainty in all indictments under the laws of the United States. "The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that if any essential element of the crime is omitted such omission can not be supplied by intendment or implication. The charge must be made directly, and not inferentially or by way of recital." *Pettibone* vs. *U. S.*, 148 U. S. 197, 202. "The indictment must be free from all ambiguity, and leave no doubt in the minds of the accused and the court of the exact offense intended to be charged, not only that the former may know what he is called upon to meet, but that upon a plea of former acquittal or conviction the record may show with accuracy the exact offense to which the plea relates." *Evans* vs. *U. S.*, 153

U. S. 584, 587. "It is certainly a fundamental principle in the common law that every party accused of crime is entitled to have every essential fact that enters into the definition of the offense set forth in an indictment, with such full and entire accuracy, that the offense may judicially appear to the court in pronouncing judgment thereon, whether upon demurrer or after conviction. * * * The indictment must be certain to every intent, and without any intendment to the contrary; and the crime must be charged with such certainty and precision that it may be understood by every one, so that the party may know how to defend against such charge. Hence, facts and not mere conclusions from facts, or conclusions of law, must be stated." *Ainsworth* vs. *U. S.*, 1 App. D. C. 518, 523. "The general, and with few exceptions, * * * the universal rule on this subject is that all the material facts and circumstances embraced in the definition of the offense must be stated, or the indictment will be defective. No essential element of the crime can be omitted without destroying the whole pleading. The omission cannot be supplied by intendment or implication, and the charge must be made directly and not inferentially or by way of recital. * * * The essential requirements, indeed, all the particulars constituting the offense of devising a scheme to defraud, are wanting. Such particulars are matters of substance, and not of form, and their omission is not aided or cured by the verdict." *U. S.* vs. *Hess*, 124 U. S. 483, 486, 488. "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment with reasonable particularity of time, place and circumstances." *U. S.* vs. *Cruikshank*, 92 U. S. 542, 558. The indictment "must charge all the facts and circumstances which constitute the offense, and not mere conclusions of the pleader, as no intendment can aid a charge where the facts and circumstances alleged do not bring the accused within the

prohibition of the law." 10 *Ency. P. & P.* 475. "Each count of an indictment is considered to all intents and purposes a separate indictment." 10 *Ency. P. & P.* 540. It is not sufficient to charge one with an offense by its technical name; but the acts which make up the offense must be stated with particularity, certainty and precision. *State* vs. *Murray*, 41 Iowa, 580, 581. "Every offense consists of certain acts done or committed under certain circumstances, and, in an indictment for the offense, it is not sufficient to charge the defendant generally with having committed it." *Archb. Cr. P. & P.* 86. Everything not expressly alalleged, or necessarily implied, is presumed against the indictment and pleader. 10 *Ency. P. & P.* 475.

Each of the cases cited shows the application of the principles stated, as does each of the following:

In an indictment for embezzlement, an allegation that the defendant sold certain lumber and converted the proceeds to his own use, is not equivalent to an averment that the proceeds of sale came into his hands. *Grant* vs. *State*, 35 Fla. 581, 585. In an indictment under section 5440 R. S. U. S., it was charged that defendant conspired to defraud the United States of the title to certain land. A necessary element of the particular offense was that the land contained minerals. The indictment charged that the defendant knew that the land contained valuable mineral deposits; but in *U. S.* vs. *Penschel*, 116 Fed. Rep. 642, 648, such an indictment was held bad because of the omission of the direct averment that the land did in fact contain minerals. A charge in an indictment that a defendant had in his possession counterfeit money, which is described; that he passed it to another person, who is named, with intent to defraud that person; states facts from which a strong inference arises that the defendant knew that the money was counterfeit; but in *U. S.* vs. *Carll*, 105 U. S. 611, 613, such an indictment was held bad because of the omission of the direct averment of knowledge. In *McCann* vs. *U. S.*, 2 Wyo. 267, *supra*, the defendant was indicted under the Act Cong. March 3, 1875, 18 Stat. 479, which enacts "that any person who shall embezzle, steal or purloin any money, property * * * of the property of the United States, shall be deemed

guilty of felony." The indictment (p. 269) alleged that McCann "at and within the district aforesaid, twenty thousand pounds of sugar * * * of the goods, chattels and property of the United States of America, then and there being found, then and there feloniously and fraudulently did embezzle, steal and purloin." This was held defective (p. 286) as charging a mere legal conclusion, leaving it impossible to determine whether the offense was committed, and the conclusion correct. It was said (p. 286) that the indictment for this offense must set forth the actual fiduciary relation and its breach; that (p. 287) the indictment did not identify the offense on the record; and did not (p. 287) secure the accused in his right to plead a former acquittal or conviction to a second prosecution for the offense. It was held (p. 288) that the words "to embezzle" were equivalent to the words "to commit embezzlement," and that (p. 289) *a count in the words of the statute was not sufficient;* that (p. 290) all the ingredients of fact that are elemental to the definition must be alleged, so as to bring the defendant precisely and clearly within the statute.

Quoting from *U. S.* v. *Hess,* 124 U. S. 483, 486, the court said in *Keck* v. *U. S.,* 172 U. S. 434, 437:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury."

In *U. S.* v. *Potter,* 56 Fed. 83 (C. C. D. Mass. 1892), on demurrer to an indictment for a violation of the national bank law, the court said (p. 89) that it is not sufficient for the pleader merely to state the facts from which an offense can be implied, or only so many of the essential elements as in the ordinary experiences of life, "or even in a statute, might suggest all the other elements; but he must state in terms everything necessary to state a criminal act." It would be sufficient if a statute set out in terms that larceny on shipboard on the high seas should be punishable; but an indictment that merely alleged that the accused committed larceny on board of a certain ship, naming it, on the high seas, *"embracing the entire phraseology*

of the statute, but without details of the property stolen and of its ownership, and the other usual details, *would be wholly insufficient*" (p. 89). There are certain offenses that are punishable independently of intent, especially under the revenue laws; but (p. 89) "generally there can be no crime unless there is a criminal purpose. Congress, however, in declaring offenses, does not always note this distinction in the terms of the statute. It sometimes prohibits the act and declares the penalty in quite the same terms, whether as a part of the revenue laws, where the intent is not always important, or as part of the general criminal code, where it is essential; but in the latter case, the courts understand that the guilty purpose is an element which must be set out in the indictment, although not necessarily in the statute." *U. S.* v. *Carll,* 105 U. S. 611, 613. Sometimes a statute (p. 89) "is so general in its terms that the indictment must allege many particulars which the statute omits." *U. S.* v. *Cruikshank,* 92 U. S. 542, 558. "While it is ordinarily enough that the indictment declares an offense in the language of the statute, * * * this is not universally true, and does not excuse the prosecutor from setting out every essential element constituting the crime" (p. 89). The court then proceeds as follows (pp. 89-90):

> "In order to properly inform the accused of the 'nature *and cause* of the accusation', within the meaning of the Constitution and of the rules of the common law, a little thought will make it plain * * * that not only must all the elements of the offense be stated in the indictment, but that they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details. The accused must receive sufficient information to enable him to reasonably understand, not only the nature of the offense, *but the particular act or acts* touching which he must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be left so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proofs on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description

> of the alleged offense. These rules are well expressed in *U. S.* v. *Cruikshank*, 92 U. S. 542, 557."

(*d*) The court below says (R. 76-77) that it was not "necessary to allege the particular manner in which the defendant unlawfully and fraudulently converted the money and appropriated the same to his own use. These words have a well known signification, common as well as legal, and are of common use in indictments for larceny and embezzlement". To this point the court cites two authorities, *Moore* v. *U. S.*, 160 U. S. 268, 271, and *Grin* v. *Shine*, 187 U. S. 186, 189, and the opinion in *Gassenheimer* v. *U. S.*, 34 W. L. R. 80, 82 (26 App. D. C. 432, 438).

These words *have not* any legal signification. They are never used in indictments for larceny. Neither of the authorities cited supports the statement, but each merely holds that the word "embezzle" has a settled technical meaning of its own, like the words "steal, take, and carry away," used in larceny. The opinion in the *Gassenheimer* case, which involved an indictment for receiving embezzled property, is unsupported by any authority or reason, in so far as it tends to sustain the proposition that an indictment for embezzlement under section 841 need not state the facts and particulars of the alleged fraud and conversion. Even though the pleading use the word "embezzle," of settled technical meaning, it is bad without the specific acts; and this must be still more true of the use of the unsettled and variable phrase, "fraudulently convert to his own use." *Batchelor* v. *U. S.*, 156 U. S. 426, 429. *U. S.* v. *Britton*, 107 U. S. 655, 661, 669. *U. S.* v. *Simmons*, 96 U. S. 360, 362

In *State* v. *Palmer* 32 La. Ann. 565, the court said (text, 571):

> "In all prosecutions for the violation of the laws of the State, the utmost certainty and distinctness of pleading, the strict construction of the provisions of penal statutes, according to the usual and reasonable meaning of words and terms, and the admission or rejection of testimony according to the rules of pleading and law of evidence, are required."

Without pursuing the subject farther, we submit that this indictment is bad for want of the particulars of the alleged fraudulent conversion.

(2) The Proof.

The indictment (R. 2) charges in but one count only a single act or offense of embezzlement, namely, the fraudulent conversion of a specific sum of money (*sic*) on a certain day. At the outset, we are met by the fact, recited (R. 40) in the bill of exceptions, that "the Government offered no evidence tending to show any conversion at one time and in one lump sum of the $15,974.07 mentioned in the indictment, nor of any conversion on November 23, 1903, the date of the offense alleged therein." *We shall look in vain to ascertain of what the accused has been convicted.*

The proof (R. 38-41) consists of an unelected, unconnected and indiscriminate mass of facts and figures, comprising not less than 92 separate and distinct items, acts or transactions, each of "which the Government claims in itself was an embezzlement"—(R. 69) an independent, substantive offense—43 of which proceded the code and the statute of limitations; the 92 items covering a period beginning on March 17, 1897, and ending after November 23, 1903—six and a half years, five of which preceded the code. The evidence comprises four distinct bank accounts, three of which preceded the code; 61 checks against these accounts, 17 of which preceded the code; 16 time certificates of deposit, 14 of which preceded the code; and 15 withdrawals, from such certificates, 12 of which preceded the code.

The court charged the jury (R. 69-70) that they "would be justified" in finding the accused guilty of the whole 92 items if he "conceived a plan to embezzle this fund systematically," though 43 of these items preceded the code, 61 of them involved checks which were not money alone mentioned in the indictment, 16 involved time certificates of deposit which were not money, *and there was not a scintilla of evidence of any such plan or embezzlement.*

Each and all of these items were offered and received in evidence as proof of distinct, substantive acts of embezzlement of money by the accused; and the court said (R. 69):

> "Inasmuch as the evidence has dealt with more than a single transaction, in the way of drawing checks and the like, [each of] which the Government claims in itself was an embezzlement, I will point out to you the considerations which ought to guide your deliberations in dealing with those various items."

The balance of the charge (R. 69-70) on this point leaves the jury at liberty (1) to convict of the entire 92 items, or (2) in any event to consider them. Whether the accused has been convicted of one, or more, or all, or none of the 92 items; or of one, or more, or all, or none of the other offenses with which the prosecutors falsely charged him in their arguments (R. 63-65) to the jury, it is impossible to say.

(*a*) A most serious question is presented as to the sufficiency of the evidence offered, to show that the accused at any time fraudulently converted to his own use the whole or any part of the receivership fund; and this requires an examination of all of the proof on this subject, the substance of which is as follows:

> On June 28, 1895, the defendants received for the land sold two checks payable to them as receivers and aggregating $21233.10 (R. 37); they endorsed these checks (R. 38), and with them opened an account as receivers in the West End National Bank on July 5, 1895 (R. 38); on March 17, 1897, by three checks payable to the Washington Loan and Trust Co., they checked out their balance (as shown by the ledger entries) in the purchase of two time certificates of deposit from said Trust Co., dated March 17, 1897 (R. 38); they renewed these certificates from time to time, receiving fourteen renewal certificates (R. 38); the first ten of these certificates were in their joint names as receivers, and the last six, beginning Aug. 25, 1900, were in their joint personal names (R. 38); with proceeds drawn from a renewal certificate, they opened account No. 22990, as receivers, in said Trust Co. on Aug. 25, 1900 (R. 38); on July 31, 1900, the auditor filed his first report, debiting defendants with $24415.13, gross proceeds of sale, rentals and interest, and crediting them with $9324.38, for costs, charges and commissions, leaving a balance of $15090.74 for distribution to creditors of said Association (R. 36); said account No. 22990 was paid out *before the code* on eight checks for certain sums on certain dates, as shown by the ledger entries (R. 38), which show the dates and amounts of deposits and payments, but not the dates of checks *or the payees or endorsers* (R. 39); none of the checks on said account was produced or put in evidence, but it was shown that none was drawn to plaintiff in error or his order except one, dated Aug. 25,

1900, and payable to him as solicitor for Wm. T. Gilbert, Receiver, for $210.00, the proceeds of the sale of the personalty (R. 39), which were not included in the annulment decree (R. 33), the auditor having reported (R. 35) "that said decree of June 27, 1896, does not include the personalty or its proceeds", and which he therefore excluded from the accounting; on Nov. 8, 1901, with proceeds drawn from a renewal certificate, the defendants opened account No. 27260 in their personal names in said Trust Co., which account was paid out on 24 checks for certain sums on certain dates, as shown by the ledger entries (R. 38), which show the dates and amounts of deposits and payments, but not the dates of checks *or the payees or endorsers* (R. 39); only eight checks on said account were produced and put in evidence (R. 39), one of which was dated April 15, 1903, for $248.43, payable to the accused as solicitor for Wm. T. Gilbert, Receiver, for his costs of appeal (see 21 App. D. C. 344, 369, ordering payment of his and Stuart's costs from this fund), and nine of said 24 checks were payable to the accused directly, and endorsed by him and paid over the bank counter in cash without further endorsement (R. 39); one of said eight checks was for $1300, dated Sept. 8, 1903, from which the signature had been cut off; and another was for $1200, dated June 20, 1903, from which the signature other than that of the plaintiff in error had been cut out; said check of Sept. 8, 1903, originally bore the genuine signatures of both defendants; these two checks, together with prior checks, were delivered by the bank to Lipscomb or Fields in unmutilated condition; the U. S. Attorney stated that *he received these checks from Lipscomb thus mutilated* (R. 40); after said account No. 27260 was closed by the final check, with this check, bearing the genuine signatures of both defendants, they opened account No. 35191 in said Trust Co. in Fields' name "for Lipscomb and Fields", which account was paid out on 26 checks for certain sums on certain dates, 20 of which post-dated the indictment date, and five of which were apparently negotiated and cashed outside of the District of Columbia, as indicated by the endorsements thereon (R. 39); these 26 checks were put in evidence but *the court ruled out all the endorsements thereon* except of Fields, because no evidence was offered to prove the same (R. 41); on fifteen certain dates between Mar. 17, 1897, and

June 23, 1903, defendants drew fifteen certain sums from certain of said certificates; fourteen of said certificates. and seventeen of said checks, and twelve of said withdrawals *were prior to Jan. 1, 1902*, the date when the code took effect; certain of said withdrawals were deposited on the same dates to the credit of one or the other of said accounts Nos. 22990 and 27260; and the amounts of two certain other withdrawals, and of some of said checks, agree with the particular amounts of certain single credits allowed the defendants by the auditor in his reports; but certain of said withdrawals, and some of said checks, do not correspond with any single credits allowed by the auditor or claimed by the defendants (R. 39); on one of said certificates of deposit, dated Nov. 8, 1901, and in the personal names of the defendants, and matured Nov. 8, 1902, Fields endorsed Lipscomb's name on Nov. 11, 1902, in his usual handwriting, and without any attempt at simulation; and on the following day Lipscomb personally endorsed this certificate (R. 39-40); subsequently Lipscomb expressly verified to said Trust Co. that Fields had authority to sign his (Lipscomb's) name to checks relating to their accounts in said Trust Co., and specially ratified all checks to which Fields had signed his (Lipscomb's) name, being only four in all and amounting in all to only $1850; on each of said four checks Fields, after having signed Lipscomb's name thereto in his usual handwriting and without any simulation, wrote immediately after Lipscomb's name, in the same handwriting, the letter "F", being the initial letter of Fields' surname (R. 40); on Nov. 12, 1902, referring to his endorsement of Lipscomb's name on the certificate of Nov. 8, 1901, Fields said to Eckloff, in the presence and hearing of Lipscomb, that he had the power to do it, and it was all right, to which statement Lipscomb made no reply (R. 40); the last three checks on account No. 27260, and all of those on account No. 35191, were left to said Trust Co., but Fields could have had the books balanced and the checks delivered to him at any time he wished prior to this prosecution (R. 40); *the said accounts were carried on openly and without any concealment* (R. 40); by the auditor's report of Dec. 7, 1903, defendants are credited with additional costs, charges and commissions amounting to $746.43, leaving a balance of $15876.57, which is awarded to the four persons named as owners in the sixth count of the

indictment, in accordance with the opinion in 21 App. D. C. 344 (R. 36-37); the auditor's distribution to all the creditors of the Association by his first report of July 31, 1900 (which was held under *supersedeas* to a large extent until March 3, 1903), was vacated under the decision in 21 App. D. C. 344, but his credits of $9324.39 to the defendants for costs, charges and commissions were not disturbed (R. 37); the auditor's report of Dec. 7, 1903 (R. 36-37) was confirmed on May 5, 1904 (R. 47-48); one of the attorneys for Morrison, a distributee named in the sixth count, testified "that as far as his knowledge goes there has been no distribution to his client" (R. 53); one of the attorneys (*Mr. Henry E. Davis was chief counsel*) for Stuart, the principal distributee named in said sixth count and by the the largest creditor, testified "that so far as he knows there has been no distribution to" Stuart (R. 53); Edson was connected with the Association when it ceased business in 1894, and is the president of the said Washington Loan and Trust Co. where defendants kept their said accounts (R. 54); Mead saw Fields give Lipscomb a thousand dollars of the proceeds of the check of Sept. 8, 1903 (R. 54-55); Wall gave Lipscomb $500 for a check in that sum two or three years ago, *which money Fields gave him* to cash said check, in which Fields said he was interested; Wall cashed the check with this money, and then gave the check to Fields; Tyser testified (R. 48) that he was a local detective, he began to look for Fields in June, 1904, and found him in March, 1905, at Carpenter's house in New York, he heard Carpenter call the defendant by the name of Dr. Brown, to which name he responded, and consented to return to Washington; the Government also produced the deposit slips relating to said accounts, and proved each to be in the handwriting *of some certain clerk* in said Trust Company, and they were then put in evidence (R. 39).

(*b*) It must be remembered—a fact which the court below totally overlooks—that this evidence was practically *ex parte*, and that *the accused was arbitrarily deprived of any chance whatever to reply* to the Government's proof; however, every word of it may be true (which it is not), and yet every dollar may have been paid over properly, or still be in hand; and proof that leaves such outstanding conditions is not legal evidence of criminal conversion. Evidence

that merely proves that a fiduciary received money, that he deposited it in a bank, that he drew it out of that bank, and stops there, is not legal evidence of criminal conversion, because the prosecution is bound to prove in addition and beyond a reasonable doubt that he criminally converted it to his own use. The evidence in this case omits to show such conversion and fraud, and they cannot be presumed. Whenever the proof traces the application of any money drawn, *it invariably shows a proper disposition of it;* and the Government did not and could not trace a single one of the 92 items so as to show conversion thereof by the accused to his own use.

The bank (R. 38, 39), not the receivers, was responsible for the error in having certain of the certificates and accounts omit the word "receivers", but this omission, which began before the code (R. 38), was not proof of conversion.

Oftentimes slight but excusable delay in the payment of trust funds gives rise to the gravest of charges against the fiduciary by some in interest; and oftentimes the unexpected results of innocent acts are made the basis of charges that such acts were done fraudulently. No man of affairs is unfamiliar with these truths in human nature and life.

Concededly, the three checks (R. 38) on the West End Bank were not acts of embezzlement; and no criticism can be made of the certificates of deposit (R. 38) except that the last six, beginning August 25, 1900, ran in defendants' personal names. Two of the withdrawals were used (R. 38) to open accounts Nos. 22990 and 27260 on August 25, 1900, and November 8, 1901; certain others were deposited on the same dates to the credit of one of the other of said accounts, and two others agree in amounts with allowed credits (R. 39). This is no evidence that any withdrawal was converted to the accused's own use. Some might have been used to pay proper demands in cash; and such demands might have been composed in some instances of one item and in others of many combined. None of the eight checks on account No. 22990 was produced, but only the ledger entries (R. 38) which show the dates and amounts of payments, but not (R. 39) the dates of checks *or the payees or endorsers;* but it was shown that none was payable to the accused (R. 39) but one, dated August 25, 1900, to him as solicitor for Gilbert, receiver, for $210, the proceeds of the sale of the personalty; *but it was not shown to whom or for what purpose the others were drawn.* This account was opened

August 25, 1900 (R. 38), which was about one month after the auditor's report of July 31, 1900 (R. 35-36), which allowed defendants credits of $9,324.39, and it was closed before Nov. 8, 1901, when account No. 27260 was opened (R. 38). This is no evidence that any check against account No. 22990 was an embezzlement. Account No. 27260 was opened November 8, 1901, and was paid out on 24 checks, only eight of which were produced (R. 39), the others being shown by the ledger entries *which do not show the payees or endorsers;* one of these checks (R. 39) for $248.43, dated Apr. 15, 1903, was payable to the accused's order as solicitor for Gilbert, receiver, for costs of appeal; and nine of the 24 were payable (R. 39) to him "directly and endorsed by him and paid over the bank counter in cash without further endorsement"; therefore the accused must have embezzled them because *the prosecution could not show for what purpose or by what authority or want of authority they were drawn or what became of the proceeds.* It was not even shown that the money for these nine checks was paid to the accused; no attempt was made to show to whom or for what purpose any one of the other fourteen checks was drawn; yet the Government claimed that the drawing of each "in itself was an embezzlement", and they went to the jury as such. The auditor's first report (R. 35-36) was to a large extent held under *supersedeas* until after the decision in 21 App. D. C. 344, on March 3, 1903, to which fact the court below refers (R. 82).

By the auditor's report of December 7, 1903 (R. 36) additional credits of $746.43 were allowed defendants; and after that date (R. 39) twenty checks on account No. 35191 were drawn, but the court ruled out (R. 41) all the endorsements on all the checks on this account, except the accused's, because there was no evidence to prove them; therefore, the accused embezzled this whole account, and each check against it was an embezzlement in itself, so the Government claimed, and the court sent each to the jury as such. All of these checks were left in bank by the accused, as well as the last three on account No. 27260, but he could have had the books balanced, and these checks delivered to him, at any time he wished, prior to this prosecution (R. 40).

Is the suggestion too violent that some of these checks and withdrawals may have been used to pay the $10,070.82 allowed defendants (R. 36) for costs, charges and commissions? Or that they

may have been used to open other proper accounts in other banks? Or for other proper purposes?

The only evidence that the balance had not been paid over, "being the property and moneys of the Washington Beneficial Endowment Association, a body corporate", was that of Mr. Robinson (R. 53), attorney for Morrison, one of the sixth count owners, that there had been no distribution to his client so far as his knowledge goes; and that of Mr. Padgett (R. 53), attorney for Stuart, also one of the sixth count owners, that there had been no distribution to his client so far as he knows. This is mere negative testimony—that these attorneys do not know a certain fact. The other two sixth count owners were ignored in proof. There was no proof that any were alive, or where they lived.

There was no evidence whatever that the Association had not been paid, or of any demand by it or refusal to pay it; yet it alone was the sole, absolute, and exclusive owner of the entire money, according to the indictment, the prosecutors, the jury, and the judgment in this case, notwithstanding the order of distribution (R. 47-48) and the other evidence in this record, which conclusively disprove such ownership. Had such proof been attempted, the prosecution would have met a condition of corporate dissolution instead of a theory of corporate existence. It was necessary, in order to reach the conviction desired, to try this case on theories of facts and law instead of conditions; and that this was done this record stands as the living proof.

There was nothing to show that prior to this indictment the accused had any knowledge of the final order of distribution of May 5, 1904 (R. 48), or that he was here when or at any time after it was passed until March, 1905, or that any demand for payment had ever been made on him by anybody, or that he had ever refused to pay; it was not shown when or for what reason or under what circumstances he went to or was in New York; it was not shown that he had ever misappropriated the money or any part of it, or that any proceedings against him had even been taken in the chancery court; but *the accused was convicted simply because he was a lawyer*, and therefore without the pale of the Sixth Amendment, and because the trial judge and prosecuting attorneys were bent on conviction at any cost. The very atmosphere of the whole trial was acutely

charged with the fear of unwarranted charges from the bench of contempt of court.

The alleged offense is of an exceedingly odious character, and especially so as against a lawyer acting as a chancery receiver in an aggravated case intimately affecting several thousands of local persons; and the trial judge should have been especially astute to protect the rights of the accused from the effects of the natural but intense prejudice which such a charge engendered; but he did quite the contrary.

The defects of the Government's prayer as to conversion (R. 58, Pr. 5, Ex. 32) are stated in our objection thereto. "It is sufficient if any part of such sum was "converted, said the court, though there is no proof of that fact; the jury should have been confined strictly to the evidence, and not left at liberty to substitute assumption or belief or speculation for proof.

There was testimony (R. 54-55) that the accused had delivered to Lipscomb one thousand dollars of said money on September 8, 1903, in Mead's presence, derived from the $1,300 check (R. 40) of that date; the court ruled this testimony a perfect defense as to the item of one thousand dollars (R. 55-56); but refused a prayer (R. 63, Pr. XXVII, Ex. 45) telling the jury that if they believe "from the evidence that any part of the sum of money mentioned in the indictment was delivered by the defendant Fields to his co-receiver Lipscomb, then they are instructed, as matter of law, that as to that money so delivered the defendant Fields is not guilty of embezzlement, and they shall so find." There was no evidence that said money had been delivered to Lipscomb for any improper purpose; and hence the refusal of our prayer was utterly inconsistent with the prior ruling (R. 56), and was equivalent to saying that the accused could be convicted of converting *to his own use* money which he had lawfully and for proper purposes delivered to Lipscomb; *and this was done.* The court below indeed says (R. 82-83) in effect that this was done, and properly done, in its opinion.

(c) It is a rule of law that the instructions given by the trial court will be regarded as the law of the case in the appellate court, in testing the sufficiency of the evidence to support the verdict. 2 *Cyc.* 725.

(1) Based solely upon Tyser's testimony (R. 48), the trial judge granted the Government's prayer telling the jury to consider the

evidence "which tends to prove that the defendant was a fugitive from justice," and if they find that he did flee from justice, that fact, "while not conclusive evidence of guilt," may, unless explained, "be accepted by the jury as circumstances [*sic*] tending to prove that he regarded himself as guilty" (R. 57-58, Ex. 31). This prayer was an incorrect statement of the law, and was not justified nor supported by the evidence, and was misleading, especially in the use of the words "conclusive" and "tends to prove". The court refused to tell the jury that the mere fact that the accused was absent from this District when unlawfully arrested, does not raise any presumption of itself, even though unexplained, that such absence was on account of the charge in this case, and that even if so, it does not of itself create any presumption of his guilt (R. 63, Pr. XXII, Ex. 43); but the court then charged (R. 69), inconsistently with the government prayer granted, that if the jury found flight for the purpose of avoiding prosecution for this particular offense, they should consider that as tending to prove guilt; and if he fled, but his flight was not connected with this particular offense, then it should have no influence one way or the other. Which instruction did the jury follow?

The testimony shows no connection whatever between the accused's absence and this charge; but such direct connection is absolutely necessary. *U. S.* v. *Williams*, 168 U. S. 382, 396. *State* v. *Palmer*, 32 La. Ann. 565, 575. The Government's granted prayer was bad in substance, but ours was good. *Hickory* v. *U. S.*, 160 U. S. 408, 422. *Alberty* v. *U. S.*, 162 U. S. 499, 508. *Starr* v. *U. S.*, 164, U. S., 627; 631. The fact that the granted prayer and the charge were inconsistent, is error. *Bank of Metropolis* v. *New England Bank*, 6 How. 212, 226. *Clem* v. *State*, 31 Ind. 480, 483. *Spivey* v. *State*, 26 Ala. 90, 102, 103. *People* v. *Messersmith*, 57 Cal. 575, 576. This is true, even though the charge was partially correct, because it is wholly impossible to determine which of the two statements was received and acted upon the jury. *Mills* v. *U. S.*, 164 U. S. 644, 649. *Hickory* v. *U. S.*, 160 U. S. 408, 422 This principle operates in the present case in many other instances of conflict between the granted prayers and the charge, and between the rulings on the evidence and the charge, etc. The proof was wholly insufficient to show flight. *People* v. *Page*, 116 Cal. 386, 397. The court had no right to leave this question to the jury at all.

(2) The trial judge told the jury that they must find from the evidence, beyond a reasonable doubt, that the accused fraudulently converted the money, or some part of it, to his own use (R. 60, Pr. X; R. 61, Pr. XI); that the intent to defraud is essential, and means a criminal intent to deprive the owner absolutely of the said money (R. 61, Pr. XIII); that a mere failure of the accused to pay over the moneys mentioned in the indictment, even though unexplained, does not raise any presumption that he has fraudulently converted or appropriated such moneys to his own use; nor does the mere fact that he may have converted or appropriated such moneys to his own use, create a presumption that the same was done fraudulently (R. 61, Pr. XIV); that the evidence must be of such force as to exclude every reasonable hypothesis of his innocence (R. 62, Pr. XV); that the law presumes, and they are "bound to assume," that the accused is innocent of the charge against him; that this presumption does not yield to a mere preponderance of evidence tending to show his guilt, but only to evidence which establishes his guilt beyond a reasonable doubt (R. 62, Pr. XVI).

These granted instructions of ours accord with the well settled law in the principles announced. Measured by them, how can it be rationally said that the evidence of conversion in this case is sufficient in law to support the verdict? The words of the court in the embezzlement case of *State* v. *Carmean*, 126 Iowa 291, 299, are exactly in point in the case at bar:

> "THE DIFFICULTY WITH THE WHOLE THEORY ON WHICH THE CASE WAS TRIED IS THAT IT SANCTIONS A CONVICTION FOR A CRIME WITHOUT ANY EVIDENCE EITHER OF ANY CRIMINAL ACT OR ANY CRIMINAL INTENT ON THE PART OF THE DEFENDANT."

In *People* v. *Page*, 116 Cal. 386 (1897), the accused was indicted and convicted of embezzlement on the following evidence (pp. 392-394):

> On Jan. 3, 1891, Page, who was then district attorney for the city and county of San Francisco, was appointed as guardian of the estate of one Lichtner, an insane person, and gave the bond required; letters of guardianship were issued; on Apr. 4, 1891, the court ordered him to file his account, but this order was not

obeyed until May 4, 1894; on June 2, 1892, he paid the asylum officers $190, and had a balance of $3776.92; when appointed, there was on deposit in bank, to the credit of his ward, $3561.01; of this sum and accumulated interest, Page, as guardian, drew out from time to time all but $51; his first check was for $353 on Apr. 24, 1891, and his last for $49.27 on Sept. 7, 1892; on June 12, 1894, the court ordered him to pay the asylum officers $475, due for the care of the ward; Page did not pay, and on July 3, 1894, an attachment was issued, but was returned unserved; on Aug. 15, 1894, another attachment was issued, but it was also returned unserved, and nothing further was done for a year; the judge testified that he did not know what Page's reasons were for not paying the money as ordered; another witness said he had been in the habit of visiting the asylum about once in six weeks, and met the ward there, and during the first part of the time he saw him he was in the pay-ward, but during the latter part he was in the pauper-ward; on May 2, 1895, the court ordered Page to appear on the next day, and show cause why he should not file his account; citation was issued and returned unserved; on May 3, 1895, the court ordered Page to appear on May 10, and show cause why he should not be removed as guardian; citation was issued and returned *non est;* the court then caused citation to be published, fixing May 20 as the date for Page to appear and show cause against removal; after publication of the citation, Page called on the judge at chambers, and asked for a postponement until May 27, which was granted; on May 27 he again called, and asked for a further continuance until the next day, which was also granted; on May 28 he did not appear, and an order was passed removing him as guardian of said estate; no other order was made, and no person was appointed in his stead, and no demand was made on him for the money of his ward in his possession; the order of removal contained a recital that it appeared to the satisfaction of the court that Page had appropriated to his own use the funds of said ward, and had rendered no account thereof; this order was received in evidence over Page's objection; in January, 1896, he was arrested in New York city, and stated to the arresting officer that he was anxious to return to stand his trial for the offense with which he was charged.

At the close of this evidence, Page moved for acquittal for its insufficiency, but his motion was overruled, and the case was submitted to the jury without further testimony. On appeal, the evidence was held wholly insufficient in law to support the verdict and judgment against the accused.

The court said (p. 395) that no order of appointment of another in his stead was made; no demand was made on him for his ward's money; there was no other evidence to show that he ever spent, wasted or appropriated to his own use any money of his ward, except the recital in the order of removal, which was incompetent as hearsay; the fact that he drew out of bank most of his ward's money, was not a criminal act, and did not show a criminal intent to misappropriate the money, such withdrawal being consistent with some other deposit or lawful use of the money, and with the supposition that at the time of the trial he might still have had all the money ready to be paid over on demand to any one authorized to receive it; the fact (pp. 395-396) that Page, when ordered to pay a certain sum to the asylum officers, did not pay it, does not tend to show a misappropriation of that sum of money, as he may have believed that his ward was kept in the pauper-ward, and that they were not entitled to pay; the failure of the accused to testify could not be taken into consideration (p. 397) by the appellate court on the point of the insufficiency of the evidence to justify the verdict, but he must be presumed to be innocent until proved to be guilty; the fact that he was arrested in New York does not warrant any inference that he was a fugutive from justice, where there is nothing in the record to show when or under what circumstances he left San Francisco and went to New York, as he may, so far as the evidence shows, have gone there on business or pleasure, intending soon to return (p. 397).

In *People* v. *Royce*, 106 Cal. 173, the defendant, who was the treasurer of an association, deposited the trust money to his personal account in bank, and was convicted of embezzlement and appealed because the verdict was not justified by the evidence. The court reversed and said (pp. 176, 177):

> "What became of this balance does not appear. Appellant may have had it ready to be produced whenever called for. * * * It does not appear that appellant ever had a successor in office. * * * There is no

> evidence that any demand was ever made upon appellant for said money by the association, or by any officer or agent thereof, or by any other person. * * * He may have had the money all that time ready to respond to any demand of the association. In fact, there is no evidence that he did not pay it over to the association. It is clear that he did not clandestinely keep it."

(3) In the present case, no demand for the money was ever made on the accused by anybody; but this was necessary. *State* v. *O'Kean*, 35 La. Ann. 901, 903. *State* v. *Reynolds*, 65 N. J. L. 424, 431. It would have been necessary before even a civil action on a receiver's bond could be maintained. The proof shows no concealment or denial by the accused, but the most open conduct. The evidence of conversion consists exclusively of bank accounts, yet *"the said accounts were carried on openly and without any concealment"* (R. 40). "It is always relevant, and indeed indispensable, to prove some kind or degree of concealment by the accused, either of the property or of the facts regarding its disposal." *Underhill Cr. Ev.* section 287. *State* v. *Fleener*, 58 Ark. 98, 104. 2 *Bish. Cr. Law*, sections 360-362. See *Staples* v. *Johnson*, 25 App. D. C. 155, 159. *State* v. *Reilly*, 4 Mo. App. 392, 399. Where is any such proof in this case? The accused left all checks on account 35191 and the last three on account 27260 in bank, which checks he could have had at any time for the mere asking (R. 40). *Does this look as if they represented embezzlements?*

The receivers were appointed on Nov. 6, 1894; the code was passed on March 3, 1901, and took effect on Jan. 1, 1902; the embezzlement is alleged to have occurred on Nov. 23, 1903; before the code, there was no law against embezzlement by receivers. *Why should the accused have faithfully performed their duties as receivers for more than eight years before the law, and then, on its enactment, promptly proceed to embezzle this fund?* The idea is as preposterous as it is false.

> "Suspicion is not proof, and cannot be allowed to take the place of proof." *Brown* v. *Petersen*, 25 App. D. C. 359, 363.

(4) Proof of failure to pay over funds, even when properly demanded, is not sufficient to warrant a conviction of embezzlement,

even though wholly unexplained. *State* v. *O'Kean,* 35 La. Ann. 901, 903. *State* v. *Smith,* 13 Kan. 274, 297. *Thomas* v. *Dunaway,* 30 Ill. 373, 389. *Snell* v. *State,* 50 Ga. 212, 222. *Fleener* v. *State,* 58 Ark. 98, 104. *State* v. *Reilly,* 4 Mo. App. 392, 397. *State* v. *Marco,* 32 Ore. 175, 177. *Robinson* v. *State,* 109 Ga. 564, 565 (bottom). *Ehrhart* v. *Rork,* 114 Ill. App. 509, 511 (bottom).

There is no proof that what the accused did was not done with his joint owners' knowledge and consent, or by the orders of the appointing court; but the record is absolutely silent on this point. Why? The district attorney had all of the orders to pay and invest, and all of the other equity papers and records in No. 15907, in his exclusive possession before, during and after the trial. Why did he not prove that the acts of the accused were without the authority of the chancery court, if such was the fact? Is not the reason as obvious as the actual fact is true? The evidence must clearly show the commission of the offense, and bring the act strictly within the statute. 15 *Cyc.* 532.

(5) Criminal intent to defraud is essential, and if the evidence is not absolutely inconsistent with good faith on the part of the accused, he must be acquitted. *McElroy* v. *People,* 202 Ill. 473, 479. *Robinson* v. *State,* 109 Ga. 564, 565. *Hamilton* v. *State,* 46 Neb. 284, 287. *Fleener* v. *State,* 59 Ark. 98, 104. *State* v. *Marco,* 32 Ore. 175, 177. *Meyers* v. *State,* 4 Ohio C. C. Rep. 570, 576. *State* v. *Schilb,* 159 Mo. 130, 140. *State* v. *Ames,* 119 Iowa 680, 683. 15 *Cyc.* 458.

The felonious intent to defraud cannot be inferred from the mere fact of conversion; or, as held in *State* v. *McDonald,* 133 N. C. 680, 682, 684:

> "In an indictment for embezzlement, the conversion being admitted or shown, the burden is on the State to show beyond a reasonable doubt the intent to defraud."

This is the settled rule. *Snell* v. *State,* 50 Ga. 219, 222. *State* v. *Reilly,* 4 Mo. App. 392, 397. *Ehrhart* v. *Rork,* 114 Ill. App. 509, 511 (bottom). In *State* v. *Carmean,* 126 Iowa 291, 298, 300, it is further held that the necessary intent cannot be inferred even from the inevitable effect of the act done, without more. In embezzlement, the intent to defraud can no more be shown by the mere

conversion than can the felonious intent in larceny by the mere taking.

(6) Is it not passing strange that there is no proof in this case as to the attitude of the appointing court, or of any charges to it or action by it as to the alleged misconduct of its receivers? Would not that court have had some say in the matter, and have acted very promptly, if there be any truth in this infamous charge? Yet we have not one word, even to show that the plaintiff in error had ever been accused or removed as receiver; and hence it is open to us to argue what is the actual fact, namely, that there never were any proceedings or charges whatever against the accused in the chancery court, or in any other court except the criminal court. Truly, a remarkable state of affairs, if the accused be guilty of embezzlement.

(*d*) The indictment (R. 2) charges the embezzlement of money as such, and nothing else; yet the court admitted in evidence (R. 38-39) 61 private checks and 16 time certificates of deposit, which were not money. They were inadmissible, because fatally variant from the charge of the pleading, and because the statute itself expressly distinguishes among "money, securities or other property". *Goodhue* v. *People*, 94 Ill. 37, 48 (charge of conversion of money; proof of county orders). *Carr* v. *State*, 104 Ala. 43, 55 (charge of conversion of bank-notes and money; proof of check). *Stewart* v. *State*, 62 Md. 412, 413 (charge of larceny of promissory notes; proof of silver certificate). *State* v. *Schilb*, 159 Mo. 130, 142 (charge of conversion of money; proof of personal property). *Weimar* v. *People*, 186 Ill. 503, 507 (charge of conversion of money; proof of town orders for which the accused had given receipts as money). *Thalheim* v. *State*, 38 Fla. 169, 204. 15 *Cyc.* 525.

(*e*) The $24,415.13 plus the $1532.26 (R. 36) were received at various times, in various amounts, from various persons, and for various obligations, and for various purposes; by many special and a few general orders which the prosecuting attorneys had in their possession, the receivers were directed to pay out various sums, at various times, to various persons, and for various purposes; they were not required to retain or pay out the identical moneys or orders or checks received; *no particular sum was shown to have been converted to his own use by the accused;* the sum charged in the indictment is a mere paper-stated and then unsegregated bal-

ance of the gross amount received (R. 36) ($25947.39), on the auditor's statement of account (R. 36); this proof is not sufficient to support the indictment. *People* v. *Howe,* 2 Thompson & Cook (N. Y.) 383, 386. *Reg.* v. *Walstenholme,* 11 Cox C. C. 313, 314.

(*f*) The deposit slips (R. 39), made up entirely by the bank clerks, without the direction or knowledge of the accused, were inadmissible. In *State* v. *Carmean,* 126 Iowa 291, entries on the books of the company, of which the accused was an officer, made by clerks in the usual course of their employment, but without the express direction or knowledge of the accused, were allowed in evidence. The court in reversing the conviction for embezzlement, said (p. 301):

> "So far as these entries were relied upon as showing the misappropriation of the money with which defendant was charged, they were not admissible. *State* v. *Ames,* 119 Iowa, 680," 684.

The mere fact that the plaintiff in error checked against the accounts, or that witnesses testified that the deposit slips and ledger entries were in their handwritings and true, did not make these incompetent documents admissible.

(*g*) A very grave question is presented by the fact that the Government, over objection and exception (R. 41, Ex. 14), was permitted to prove, under this indictment in but one count alleging but one act on one certain date, *no less than ninety-two separate and distinct items, each as a substantive offense.* We have already said that we have no statute here dispensing with the particulars in embezzlement, so as to allow evidence of a series of acts, or of all that the accused did by virtue of his office or employment, to go to the jury without election, leaving them a license to convict on the whole. The embezzlement statutes of some States permit this, and a few cases uphold such practice under them, and sustain their constitutionality upon the ground of the right and duty of the trial court to grant the accused a bill of particulars on demand.

The sole reason upon which such statutes are based, and evidence of various acts is admitted, is the difficulty or impossibility of proving any specific conversion; but this reason has no place whatever in the present case, because each transaction (R. 38-41) was in itself not only capable of distinct proof, but was in fact so proved *and only so proved.*

The accused has the right to be informed of the nature and cause of the accusation against him. In this case he was informed by the indictment of one specific accusation, yet the Government made no attempt, even, to prove that (R. 40), but proved 92 other and distinct acts as the accusation, and claimed (R. 69) that *each was in itself a substantive act of embezzlement;* and neither made, nor was required to make, any election among these acts, but relied on each and all as the offense charged in the indictment.

By our motion for a bill of particulars (R. 7-8) which was overruled (R. 17, 29, Ex. 2), we sought to have the prosecution specify or elect the particular act or item and evidence on which it intended to rely, concerning which the indictment gave us no information if the Government did not intend to rely on the specific act therein stated, of which intention the prosecution had full knowledge, but we had none—not even information. We especially objected to the Government's being permitted to show, under this indictment charging only a single act, *"any number of alleged acts of embezzlement under an indictment which alleges the embezzlement of a lump sum on a particular day"* (R. 41, Ex. 14). This objection went to all such evidence and to the principle on which it was received, but it was overruled, and we excepted. It was unnecessary again to object and except at any stage of the case, in order to save the point for review—not even to the charge to the jury.

To each and all of the certificates of deposit, withdrawals and checks, we specifically objected, were overruled, and excepted (R. 40, Ex. 13). We also made a special objection to the last 20 checks on account No. 35191, all of which post-dated the indictment date November 23, 1903, but were overruled, and excepted (R. 41, Ex. 14). Appellant was neither indicted for, nor informed of, any one of the 92 acts, and the Government had not right to try him on any one of them, unless, at the beginning of the trial, it elected some one single, particular act or item like the one alleged as that, and that alone, on which it would rely; and when it both failed and refused to do so, with the court's approval, the law itself inexorably elected the act or item first proved as that, and that only, on which the prosecution could rely. Here the act or item of alleged embezzlement first proved was not only perfectly innocent *per se,* but also preceded the code itself, and was barred by the statute of limitations. Without stopping to make any selection, it is very certain

that some one of the 43 acts or items which preceded the code was that first proved. The election first made by the prosecution or the law is final, and cannot be abandoned.

Every one of the 92 acts or items in evidence was independent of all of the others, and each had and left its own separate and indelible record, complete in itself; and it required none of the other 91 acts or items to prove or explain it. As the case was presented, we have no particular act or item relied on—in short, *no corpus delicti*. It would have been just as proper to allege the 92 acts in one count and prove one, as to aver one and prove 92, unelected as to all, and variant and barred and before the law as to many. The law requires that there shall be but one *corpus delicti* to one count, but here we have 92 or none.

The general rule, of course, is that evidence tending to show that the accused has committed, or attempted to commit, other offenses, independent of that charged, is inadmissible. The rule applies equally whether the other offenses be similar or dissimilar to that charged. To this rule there are certain exceptions, one of which allows such evidence to show the intent of the act charged, but not to prove such other acts as substantive offenses. The first requisite is a *corpus delicti*—one definite act—which must first be proved, as well as defendant's connection therewith, before evidence of other offenses is admissible.

Of course, if there is no *corpus delicti* properly designated and proved, there is no possible basis for evidence of various offenses, for in such case they cannot be proved as other than substantive offenses. You cannot give evidence to aid the proof of the principal act if *there is no principal act*, as was pointed out by the court in *People* v. *Flaherty*, 162 N. Y. 532, 542, in *People* v. *Williams*, 133 Cal. 165, 169, and in *People* v. *Castro*, 133 Cal. 11, 13. What is the principal act—the *corpus delicti*—in the case at bar? In *People* v. *Howe*, 2 Thomp. & C. (N. Y. 1873) 383, the court said (p. 386):

> "The conviction in this case seems to have taken place under *an entire misconception as to what constitutes the crime of embezzlement*, the mode in which it is to be charged, and the evidence by which it is to be established. * * * Each specific act of embezzlement is a specific offense, and must be so charged with all necessary certainty and particularity to enable the defend-

ant to understand and prepare to meet the specific charge. * * * *Some specific sum must be proved to have been embezzled,* the same as in larceny some particular article must be proved to have been stolen. The course adopted in the case at bar subjects a party to be required to meet any number of distinct offenses under *one count* in the indictment, and to a conviction, *if any one of a hundred distinct offenses sought to be proved* should be found to be established."

In *People* v. *Williams,* 133 Cal. 165, the court said (p. 169):

"Many alleged acts were specifically described with circumstances of time, etc. Each of these acts was a separate offense, and the defendant could be tried for either, and separately for each of them. The jury were not even told that they must all agree that some specifically described act had been performed. A verdict of guilty could have been rendered under such an instruction, although no two jurrors were convinced beyond a reasonable doubt, or at all, of the truth of the charge, as to any one of these separate offenses. Even worse than that was possible. As to every specific offense which there was an attempt to prove, and which could be met by proof, the defendant may have established his defense and yet upon the general evidence of continuous crime, which, in the nature of things, he could only meet by his personal denial, he may have been convicted. And how could he defend when *he was not informed as to what particular offense, out of hundreds* testified to by the prosecutrix, he was to be tried? Such a trial, upon a charge so indefinite as to circumstance of time or place, or any particular, except by the general designation, would be *a judicial farce, if it were not something a great deal worse.* That it was wrong, was held in the recent case of *People* v. *Castro",* 133 Cal. 11, 13.

The same principles are very emphatically declared in *People* v. *Flaherty,* 162 N. Y. 532, 538.

In *Edelhoff* v. *State,* 5 Wyo. 19, an agent was charged with the embezzlement of monthly rents; he reported that the premises were vacant; proof was admitted of all the monthly conversions; no election was asked, and no instruction was given limiting the evidence to a single act or item; the jury returned a general verdict of

guilty; the court reviewed many authorities, reversed and said (p. 28):

> "It seems to us that the offense of embezzlement was complete in each month, as all the elements of the crime were present, and the offense of embezzlement was complete. These monthly offenses were not dependent upon each other, and taken together, do not constitute a single fact of one endeavor. *Neither was the offense a continuing one,* as it presents none of the conditions of the old illustration—that of a felonious taking of gas from a main or wine from a butt by means of a tube, where the felonious asportation was uninterrupted and continuous. * * * *Each transaction is separate and distinct,* and in no manner dependent upon another."

In *Kribs* v. *People,* 82 Ill. 425, the defendant was convicted of embezzlement, and sued out a writ of error. The court said (p. 426):

> "On the trial, the court allowed the people, over the objection of the defendant, to prove that the defendant had collected or received money belonging to other parties, and on several occasions, which he had fraudulently converted to his own use. This was error. The evidence should have been confined to the charge for which the defendant was indicted. On the trial of this indictment, the law did not require him to come prepared to meet other charges, nor does it follow, because he may have been guilty of other like offenses, he was guilty of the offense charged in the indictment. The evidence should have been confined strictly to the offense charged in the indictment."

It is well settled that *"only one act of embezzlement, and upon a single day or occasion, can be shown under this indictment". Com.* v. *Bennett,* 118 Mass. 443, 448, 453. *Goodhue* v. *People,* 94 Ill. 37, 51. *People* v. *Hurlburt,* 92 Hun. 46, 48, 50. *Com.* v. *Shepard,* 1 Allen 575, 581. *Hoyt* v. *State,* 50 Ga. 313, 322. *Rex.* v. *Williams,* 6 C. & P. 626 (bottom). "Evidence of different acts to prove the one charge [of embezzlement by a guardian] can not be received, but * * * the State must elect as to one act upon which it relies to prove the charge." *Myers* v. *State,* 4 Ohio C. C. Rep. 570, 574. Evidence of other transactions, even though criminal, is inadmissible unless they tend to show criminal intent with reference to the mis-

appropriation of the particular money charged in the indictment. *State* v. *Carmean*, 126 Iowa 291, 299.

In *Com.* v. *Wyman*, 8 Metc. 247, the court said (pp. 254, 259):

> "A bank officer, when accused of embezzlement, must be charged with a specific act of fraud, as in larceny at common law, and be proved guilty of the specific offense charged. • • •
>
> "The ruling of the learned judge, in admitting evidence, under this indictment, of *several acts of embezzlement, cannot be sustained.*"

If the prosecution does not intend to rely upon the act charged in the indictment, then it is *bound to elect* some one specific act upon which it will rely for conviction. In the quite remarkable case of *People* v. *Flaherty*, 162 N. Y. 532, the court said (p. 539) that the accused is entitled to know at the beginning of the trial whether he is to be tried for an offense committed on the day alleged in the indictment; and if not, then the prosecution must state the offense which it is proposed to prove as the one charged in the indictment; and it is prejudicial error to refuse to compel an election, or to postpone the election, until the close of the prosecution's case; for the accused is only required to come prepared to meet the specific charge of the indictment against him.

The same doctrines are declared in *People* v. *Williams*, 133 Cal. 165, 169, *People* v. *Castro*, 133 Cal. 11, 13, and *State* v. *Nagle*, 14 R. I. 331, 334.

In *State* v. *Bates*, 10 Conn. 372, the court said (p. 373):

> "The accused comes prepared to defend against a single charge. This he may do successfully, and, having done so, may find himself overwhelmed by a multitude of others of which the information gave him no notice, and against which he cannot be supposed to be prepared. And the prosecuting attorney, instead of shaping his case, at the outset, in the most favorable manner, may detain the court and jury by proving any number of offenses, and then elect on which to claim a conviction. Why should this be done? He is supposed to be in the possession of the proofs, and should make his election from the first."

Election can be compelled either by a direct motion to that effect, or by an objection to evidence of more than one act; or as said in *State* v. *Chisnell*, 36 W. Va. 659, 663:

> "The defendant did not in this case move that the State should elect the sale on which it would stake its case, but she objected to evidence of another sale; and this, it seems to me, called upon the court to give her the benefit of that objection by the only proper order which could give her its benefit, that is, by ordering the prosecuting attorney to make such election."

The rule requiring election is universal, if the proof shows more than one offense. *The accused is entitled to know the specific act* which is relied upon, so that he may properly meet the charge, and in order that conviction *shall not be a matter of choice between or among offenses.* While there is some conflict as to the time of election, all of the courts agree that it must be made before the accused is required to give his proof. After election, evidence of other substantive offenses is inadmissible. The election must be definite enough to inform the accused clearly of the particular act relied upon for conviction; and when once made, it cannot be retracted.

If the prosecution fails or refuses to elect, then the law elects the first act as to which evidence is offered. *State* v. *Hilberg*, 22 Utah 27, 33. *People* v. *Jeness*, 5 Mich. 305, 327. *People* v. *Clark*, 33 Mich. 112, 115. *State* v. *King*, 66 Miss. 502, 507. *People* v. *Williams*, 133 Cal. 165, 169. *Richardson* v. *State*, 63 Ind. 192, 193. *Fields* v. *Territory*, 1 Wyo. 78, 81. *State* v. *Nagle*, 14 R. I. 331, 334. *State* v. *Chisnell*, 36 W. Va. 659, 662. *State* v. *Brunker*, 46 Conn. 327, 329. *Lovell* v. *State*, 12 Ind. 18, 19. *Elm* v. *State*, 26 Ala. 48, 51. *McPherson* v. *State*, 54 Ala. 221, 223. *Hughes* v. *State*, 35 Ala. 351, 361. *Sullivan* v. *State*, 68 Ala. 525, 529. *Jackson* v. *State*, 95 Ala. 17, 18. *McDonald* v. *People*, 126 Ill. 150, 165.

What is the principal act, or the act first proved in this case? How is it possible to designate one? Is it not clear that there never was one? How could the accused defend himself?

Let us assume that we have a principal act charged and adhered to in this case; proof of other prior offenses (*sic*) is admissible, not as substantive offenses, but only to aid the proof of some essential element of the principal act, such as the fraudulent intent. The

conviction can be based only upon the principal act, and never upon those called in to aid the proof of it. It is imperative, however, that the other acts shall be shown to be actual offenses in and of themselves. *Gassenheimer* v. *State,* 52 Ala. 313, 318; *Gassenheimer* v. *U. S.,* 26 App. D. C. 432, 443, and cases therein cited.

Without entering into a discussion of the many phases of the law relating to evidence of other offenses, and the exceptions to the rule prohibiting such evidence, which would only intensify the errors in this case, is it not very clear that the course pursued respecting the proof of the alleged conversion was in gross violation of the rights of the accused? Is it possible to justify it? There was not a scintilla of proof or even claim or insinuation of any "plan to embezzle", but this idea was for the first time interjected into the case by the trial judge, who said to the jury (R. 69-70):

> "If you find from the evidence that after January 1st, 1902, the defendant conceived a plan to embezzle this fund systematically, and he did embezzle it at different times in accordance with that preconceived plan, *then you would be justified in finding him guilty concerning all the embezzlements* that you find the proof makes out."

By this charge each of the 92 items is received as in itself a substantive act of embezzlement, and not merely to aid the proof of some particular one of them elected by the prosecution or the law; the defendant is to be convicted of 92 separate, unconnected and distinct acts, items or transactions under one count charging but a single act on a certain date, though none of these acts is proved to be an act of embezzlement, there is no proof of any connection between them, 43 of them preceded the code, 61 involved private checks which were not money, and 16 related to time certificates of deposit which were not money. *Of what has the accused been convicted?* Certainly not of what he was charged with, for the Government made no attempt even (R. 40) to prove that charge as laid. The rational way is to prove the plan first, and then the prior acts done in pursuance thereof, not as substantive offenses but only in aid of the proof of the particular act relied on as the *corpus delicti.* What was the "plan" in this case? Where is the evidence of any "plan"? None, absolutely none.

In each of the "plan" cases there was a single, specific act alleged or elected as the principal act relied on as the *corpus delicti;* the plan was first shown, and then the evidence of the prior contemporaneous offenses committed in pursuance thereof, and to prepare the way for the commisssion of the principal act, was received, not as substantive offenses, but only to aid the proof of the principal act; and this not unless the evidence clearly showed a direct connection between the prior offenses and that relied on by the prosecution. There is no proof at all of any connection as offenses among these 92 items, though it is necessary. The word "justified" in the charge (R. 70) was misleading. We cannot find nor conceive of any case to justify the evidence and charge in this case as to the 92 acts or items. On no tenable theory can the procedure in this case be sustained, under the Constitution and the laws.

The trial judge, after having told the jury they could convict of all acts shown, then told them in the alternative (R. 70):

> "But if you find there was not such a plan preconceived by him before a first embezzlement, and conclude from the evidence that each conversion by him * * * was in itself distinct from every other * * * , then you would only be justified in that state of affairs in finding him guilty upon one single conversion, concerning which all of you must agree."

Which instruction did the jury follow? If that just quoted, upon what (if any) "one single conversion" did they agree? Did all agree upon the same one? Who can tell? Did they convict of some payment made under some specific order of the chancery court, or of the Court of Appeals? Was the accused not entitled to be informed of the "one single conversion, concerning which all of you must agree"? Was no *corpus delicti* required to be made known to him? Had he no right before, during, or after the alleged trial, to be informed of the nature and cause of the real accusation against him? Our prayers for a verdict on all the evidence (R. 59, Pr. 1, Ex. 35; R. 59, Pr. IV, Ex. 36) should surely have been granted.

(*h*) On the evidence in this case, it is of course impossible from any view-point for Lipscomb to be innocent and the plaintiff in error guilty; and as Lipscomb was acquitted on this same government proof, when tried a few months after this alleged trial, both re-

ceivers must be innocent. Certainly the evidence is not sufficient to warrant a conviction of either. Why was Lipscomb acquitted and Fields convicted? Simply because the former was accorded the rights summarily denied the latter, and things as to either were not as they seemed to some then intensely prejudiced persons.

(*i*) Among other things, the Government put in evidence (R. 34) three certain reports of the accused, as admissions by him of the alleged fiduciary relation and the receipt and possession of the money; to each of which reports the accused duly objected and excepted (R. 34-35, Ev. 11). With the equity case No. 15907, mentioned in the indictment, three others, to each of which the accused was a party defendant, were consolidated (R. 48-49). He was required to appear before the said court and its auditor, as a witness or a party or a receiver in all four cases, and at three different times before the code was passed, he was compelled to prepare and produce and file these reports. As to them the court below says (p. 80) that "the reports signed by defendant and his co-receiver showed that the amount charged in the indictment was in their possession by virtue of their appointment and acceptance of the trust." Farther on (R. 81) the court says:

> "The several receivers' reports showing their account and the possession of the balance charged in the indictment, were not only shown to be papers belonging to the record of the equity suit, but defendant's signature thereto was proved."

The trial court is a court of the United States, so declared by statute, and so decided time and again since its creation. This proceeding involves both a charge of crime and a pecuniary forfeiture. The said reports were inadmissible under *R. S. U. S.*, section 860, which is in full as follows:

> "No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture."

Like as to many other points, the Court of Appeals is wholly silent as to this; but not because it was not properly presented and fully argued in that tribunal.

(*k*) As we have pointed out, the proof of the alleged fraudulent conversion in this case is in substance (R. 37-41) merely that the defendants (1) received the money, (2) deposited it in banks, and (3) drew it out of banks, without more; except that in one instance, concerning a certain check (R. 40), it was shown without any contradiction (R. 54-55) that the accused cashed it at bank, and at once delivered $1,000 thereof in money to his co-receiver Lipscomb in the presence of the witness Mead, but there was no proof whatever of any improper purpose, or of any purpose, for which the accused so delivered the said money; and as to this very item, the ruling of the trial court (R. 55-56) on the Government's objection and in the jury's presence, and the opinion [R. 83] of the Court of Appeals in its attempt [27 App. D. C. 448] to do the impossible, viz: to point out the particular act, item, charge or offense (if any) of which the jury convicted, are as follows:

TRIAL COURT.

"It is quite clear to me that if you charge a receiver with embezzling one thousand dollars, it means that he wrongfully converts it to his own use. If he shows that he did not wrongfully convert that thousand dollars to his own use, but gave it to his co-receiver, who, under the law, was entitled to have possession of it, *that is an absolute defense to that item.*"

COURT OF APPEALS.

"There being no single circumstance tending to show that it was a mere irregularity without intent to do wrong, the jury might well have considered the act, to that extent, not only a wrongful but also *a fraudulent conversion of so much of the fund.*"

In this case the Court of Appeals has enounced and applied the novel, false, radical, dangerous and impossible doctrines that—

(R. 82, 83)) (*a*) On the trial of one or two joint receivers, on the charge that he has fraudulently converted the trust fund to his own use, and thereby embezzled the same, it is sufficient to convict him simply to show that they drew a joint check (R. 40) for a small part of the fund and he cashed it at bank (R. 54) and at once delivered the money to his co-receiver (R. 55).

(R. 83) (*b*) Such evidence casts the burden on the accused "to show that it [such delivery] was a mere irregularity without intent to do wrong", and, if he does not so show, the jury may well consider "the act, to that extent, not only a wrongful, but also a fraudulent conversion of so much of the fund", though the trial court tells the jury the very contrary, and the statute requires a fraudulent conversion to his own use, not the use of another.

(R. 79, 80) (*c*) If one of two joint receivers permits the trust fund or any part thereof to go into the manual possession of his co-receiver for the sole purpose of *bona fide* investment by the latter in certain safe securities, and the said fund never came into the exclusive possesssion or control of the former, nevertheless he is *ipso facto* guilty of embezzlement thereof.

(R. 80) (*d*) One of two joint receivers cannot, even with the authority of his co-receiver (R. 30), act for both in any emergency or under any circumstances, in receiving (R. 40) or disbursing the trust fund or any part thereof, and if he does so act he is *ipso facto* guilty of embezzlement thereof.

If these doctrines be the law, then it must be true that it is *ipso facto* embezzlement for one to be appointed and to act as a chancery receiver. Except "for the purposes of this case", it cannot be seriously supposed that the appellate judge, under normal conditions, would declare any such principles to be the law. The courts below simply suspended the Constitution and laws "for the purposes of this case."

The opinion of the court below (R. 82) says the evidence of conversion is sufficient on this bill of exceptions. The record (R. 38-39) expressly shows that the money *was not* removed (R. 82) from the Trust Co. "into other banks"; that $10,070.82 of it was absolutely and finally allowed the accused, and ordered paid for costs, charges and commissions (R. 36); that they opened one account (R. 38) in the Trust Co. as receivers; that they afterwards (R. 38, 39) opened two others there as individuals; that some checks on the two were payable to the plaintiff in error. Was it embezzlement for them to open accounts in the same Trust Co. as individuals with their own money which the court had absolutely and finally awarded them by express orders, or to draw it out, whether by checks to Fields' order or any body else's? Not a two-hundredth part of the equity orders and papers were put in evidence in this case. Many, many orders

to pay out, or to invest, were made, as to which this record is silent, for they directed the accused's very acts which are held embezzlements in this case.

The opinion below is that if joint trustees draw money, which is placed in the manual possession of one, this is *per se* embezzlement by the one who lets go, without any further proof. Are joint trustees required to go about each holding to a corner of the trust fund or evidence of it? If he who lets go can prove (if given the chance) that the fund passed lawfully to the other for the sole purpose of *bona fide* investment by him, can he show no defense to a charge of embezzling that fund?

The opinion says (R. 77) that section 841, as to the act of embezzlement, " is necessarily prospective in its operation," and that it applies only "when embezzled thereafter". But here the court received evidence of 43 separate and distinct acts or items *before the code*, each as proof of a substantive offense, and no election was ever made by the prosecution, but was expressly denied (R. 41, Ex. 14) by the court, who charged (R. 68-70) the jury that they could convict of all—both the 43 before and the 49 after—if they would imagine a plan to embezzle, from no evidence thereof. "Fourteen of said certificates and seventeen of said checks and twelve of said withdrawals were prior to January 1, 1902" (R. 39), when the code took effect. "It is elementary that the admission of illegal evidence over objection necessitates reversal." *Waldron* v. *Waldron*, 156 U. S. 361, 380.

Since the court below has, to some extent, touched on the proof of conversion in its discussion (R. 78-80) of our motion for continuance, we have done the same; and, therefore, shall not repeat what we then said, as terminal facilities are necessary.

(*l*) It must not be forgotten that this is not the first or only case in which judges and juries and auditors of the Supreme Court of the District of Columbia, even in civil cases, *have been quick to convict both the living and the dead of gross frauds, on absolutely no evidence whatever;* nor in which the Court of Appeals of the District of Columbia has been swift to affirm such judgments; nor in which this court, in no uncertain terms, has reversed such judgments as, fortunately, could be reviewed here. Reference to the reversals of the dangerous decisions in the following cases is more than enough to cause pause before accepting the ruling of the courts be-

low that the evidence in this case is sufficient to destroy a man: *Baker* v. *Cummings*, 169 U. S. 189, 206 (8 App. D. C. 515). *Beyer* v. *LeFevre*, 186 U. S. 114, 119 (17 App. D. C. 238). *Darlington* v. *Turner*, 202 U. S. 195, 220 (24 App. D. C. 573, *per* Shepard, Ch. J.). It seems to be distressingly true that a mere charge of fraud is equivalent to certain conviction in the courts below.

XI. IMPROPER COMMENTS OF TRIAL JUDGE.

The bill of exceptions (R. 57, 58-59) recites the following remarkable occurrence in the presence of the jury, during the alleged trial of this case, just after the close of all of the evidence—a most crucial and critical point of the proceedings:

> "Thereupon the Government and the defendant handed up their respective prayers for instructions, the defendant's counsel stating to the court that the determination of what of his prayers would be offered would depend on the court's ruling on others, as the court would see from the drafts of the prayers handed up. The court then took a recess. After recess the following occurred: *The Court*: Mr. Stenographer, you may note that a series of 27 special prayers were submitted to the court, fastened together by counsel for the defendant. The court has examined them sufficiently to ascertain that some are improper statements of law without taking the entire series into view, and they are refused. *Mr. Baker*: We note an exception to the refusal of each prayer. We note an exception separately to the refusal to each prayer offered. I wish your Honor to understand that we do not offer the prayers as a series. We offer each one separately, and ask your Honor's ruling on each prayer. *The Court*: I overrule them. They are put together as a series, and as a series are refused. *Mr. Baker*: Then I offer prayer No. 1. But I suppose the Government should offer their prayers first. I would like to have an exception to the court's refusal to consider the prayers.
>
> "Thereupon the said prayers were handed to the clerk, and filed in open court endorsed by the court as follows: 'This series of instructions is refused as a series and ex. *Wright*.
>
> • • • • • • • • • • • •

"Thereupon the following occurred:

"*The Court*: I should perhaps make it clear right here and now, that it is a question which ought to be settled whether it is appropriate in this jurisdiction for counsel to submit a series of all the way from 27 instructions up to an indefinite number. Some 27 prayers have been submitted here in a series, and in a manner that indicates that the purpose of the request is not to ascertain the opinion of this court on the law in respect to this trial but to save some possible point for reversal in another court. I started to examine these prayers during the recess, and the time afforded did not suffice for the examination of a fifth of them. For me to examine this series of prayers in detail would require the postponing of this trial over two or three days. As before said, they are offered in a series, and as a series they are refused, because some of them are improper statements of law. *Mr. Baker*: If your Honor please, I will state that the prayers are not offered in a series. They are not offered for the purpose of having—*The Court*: You will not state that, either. What I say controls that. *Mr. Baker*: Then I note an exception to the court's ruling, and I ask to offer these prayers separately. *The Court*: I will not permit them to be offered separately in any form in which they are. *Mr. Baker*: Then I note an exception to the ruling of the court." (R. 58-59, Ex. 33).

(*a*) The opening clause expressly shows that our prayers were not offered at all, either singly, or as a series, or otherwise, and that the court was mistaken in so stating. This was tacitly admitted by the fact that the court subsequently *(but after all the harm had been done)* passed on our prayers separately (R. 57), four of which were abandoned on account of "the court's ruling on others" handed up.

It has been settled ever since this jurisdiction began that it is not appropriate for counsel to submit prayers in a series, and this is never done. We know full well the established law on this subject. The court directly charged us with trying to trap the trial tribunal through technical tactics, whereas we were acting in entire good faith and were astounded by the attitude assumed by the court. "Some 27 prayers have been submitted here in a series, *and in a manner that indicates that the purpose of the request is not to ascer-*

tain the opinion of this court on the law in respect to this trial, but to save some possible point for reversal in another court." Counsel said, "the prayers are not offered as a series", and tried to say that they were not offered for the purpose stated by the court, but was cut short by the judge with the curt and angry remark: "You will not state that, either. What I say controls that." We excepted and re-excepted, during this proceeding, to the court's rulings. The recess was for 45 minutes. It requires just *six minutes* to read the 27 prayers "handed up", and less than that to read those actually offered. None contains anything but pertinent principles of law of an elementary nature.

"To save some possible point for reversal in another court." *There could be no reversal without conviction,* in this case. This was an emphatic statement that the accused was guilty and would be convicted,—an open declaration to the jury, the counsel and the parties. It was emphasized by the granting of the Government's prayers (R. 57-58), for the reasons stated in our objections thereto. It was intensified by the following (R. 62):

> "The defendant then asked the following instruction: 'The jury are instructed that upon the evidence in this case, *they may find the defendant not guilty* on the two counts of the indictment, and they must find him not guilty on at least one of the counts. * * * The court refused this prayer; to which refusal the defendant duly reserved his Exception 42; and when refusing said prayer, the court, of its own motion then gave the jury the following instruction: 'The jury are instructed that upon the evidence in this case they cannot find the defendant guilty on both of the counts which are submitted to them.' (XX A)."

This, in the jury's presence, simply told them that they could not find the defendant not guilty on both counts, *but must find him guilty on one.*

We think there was grave and reversible error in the comments of the court above set out.

(*b*) A federal judge has no right, directly or indirectly, to charge a jury, or to tell them he thinks it is their duty, to return a verdict of guilty in a criminal case. If he expresses any opinion on the facts or the weight of the evidence, he must plainly tell the jury that

they are not bound by his opinion, but are themselves the sole judges of the facts and the weight of the evidence. The general rule is that it is error for the judge to comment on the weight or sufficiency of the evidence at any time during the trial, or to state expressly or by implication his belief as to the guilt of the defendant. 12 *Cyc.* 540, 596, *et seq.* It is error for him to make comments reflecting on the accused or his counsel *Allen* v. *U. S.*, 115 Fed. 3 (C. C. A.), in which, in a vigorous opinion, the conviction was reversed for such comments. *Mullen* v. *U. S.*, 106 Fed. 892 (C. C. A.), is strongly in point.

The comments of the court, in our case, contained a serious charge against both the accused and his counsel, which was erroneous. A trial judge has no right to use harsh language even to a witness when testifying, nor to comment on his testimony, when charging the jury, in such manner as to discredit him . *Ruppert* v. *Wolf*, 4 App. D. C. 556, 558. In the case just cited the judgment was reversed, regardless of other errors assigned, solely because of harsh comments of the trial judge reflecting on a witness, though the verdict was concededly right on the evidence, in the opinion of the appellate court. The court severely condemns any remarks of a trial judge, even a civil case, which may tend to prejudice the jury. *Hicks v.* U. S., 150 U. S. 442, 452, and *Starr* v. *U. S.*, 153 U. S. 614, 626, are quoted. Attention is called to the fact that the judge's lightest word is properly enough given great weight by the jury; that the policy of the law is defeated by hostile comments of the trial judge, whose duty it is to give reasonable force and effect to the law; and that "it is obvious that under any system of jury trials the influence of the trial judge on the jury is necessarily and properly of great weight, and that his lightest word or intimation is received with deference and may prove controlling."

"To save some possible point for reversal in another court," and refusing to tell the jury that they might find the defendant not guilty on the two counts, are rather stronger than a trial judge's "lightest word or intimation" that alone "may prove controlling". *Hickory* vs. *U. S.*, 160 U. S. 408, 421.

These comments of the trial judge must necessarily have detracted very materially from the consideration which the jury should have given our granted prayers, if, indeed, they were not entirely destroyed by such comments; yet in *Burton* v. *United States*, 196

U. S. 283, this court held it error for the trial judge even to refer to the defendant's prayers as abstract propositions of law.

(*c*) The appellate judge concedes (R. 82) that the jury was present when the trial judge made the comments which we have quoted; and he says (R. 82) that they "may have been unnecessarily severe upon counsel, * * * but we find nothing therein calculated to influence the jury against the defendant." He also says (R. 81) that our exception to these comments "is of no consequence, because each of these [prayers] was thereafter submitted separately, and either *given* or refused."

He has utterly missed the points of our exceptions, which were (1) that these comments from the bench declared to the jury the guilt and certain conviction of the accused, (2) they seriously reflected upon the accused and his counsel, and (3) they necessarily weakened or destroyed the effect of our prayers *which were granted*. Obviously, they had no effect on our prayers which were refused, as the appellate judge seems to think. In the *Burton* case, *supra*, the court's comments related only to the defendant's prayers which were granted; and of these prayers the trial judge said (p. 304, bottom) that they—

> "are abstract propositions of law, which I give in connection with the charge, as perhaps more fully amplifying it. I am willing to give them, inasmuch as they are asked, and they contain general propositions of law."

This court held (pp. 304-307) these comments to be reversible error, and the conviction was set aside. In the present case, the objectionable comments went far beyond those in the *Burton* case, and were far more prejudicial to the accused; yet the appellate judge finds "nothing therein calculated to influence the jury against the defendant." *Is not this statement incredible? Suppose the jury did find something therein calculated to influence them against the defendant?* Surely they did, if they were humans—and they were.

XII. GOOD CHARACTER.

The plaintiff in error did not testify in this case, because neither he nor his counsel were allowed any time to prepare for trial on the merits, or any necessary facilities or opportunities for such prepara-

tion. No evidence of the accused's character was offered. He alone could open the door for such evidence. He was not bound to do so, but might, if he saw fit, rely upon the legal presumption of his good character. This he saw fit to do, from the very necessity of the helpless position in which the trial court had unjustly placed him, and he therefore asked the following instruction (R. 63, Prayer XXV, Exception 44):

> "The jury are instructed in this case that the law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in their consideration of the evidence."

The court refused this prayer, but the record is silent as to his reasons, which were (1) that there is no such presumption, and (2) that even if there is, the accused is not entitled to any instruction or charge on the subject in the absence of any evidence concerning his character.

The appellate judge (R. 83) attempts to justify the refusal of this prayer on two grounds, viz., (1) the prayer is too broad, and (2) the "court is not required to give an instruction on anything that has not been put in issue". For the purpose of the first reason, he assumes that the accused was entitled to demand an instruction that good character is to be presumed, even when no issue is made thereon. He evidently believes that there is no such presumption, if we mistake not his words.

In the first place, our prayer was not refused because it was too broad, nor on account of its language, but solely because of the principle declared; and in the second place, it was not too broad. The elements of good character are uprightness, honesty and integrity, as is clearly shown in detail in March Thesaurus Dictionary pp. 148, 508, 896, 1123-1125 (1906). By what reason can a prayer on good character be made bad because it defines the subject-matter by stating its constituent elements? Indeed the terms used, "an upright, honest man of integrity", are mere synonyms of good character.

Even if our prayer was too broad, yet if it was sound in substance, or if it be assumed that we were entitled to an instruction on the subject, then "*it was error in the court to refuse it without giving an appropriate instructions on the subject* to which it relates." *Texas*

& *P. Ry. Co.* v. *White*, 101 Fed. Rep. (C. C. A.) 928, 932, and cases therein cited. Here the trial judge refused absolutely to say one word to the jury on the subject of the presumption of good character to which our prayer related. It would be just as reasonable to refuse to charge the jury as to the presumption of innocence or the burden of proof or the reasonable doubt, if the accused's requests on these subjects happened to be too broad.

The appellate judge's second reason is inconsistent with the existence of a presumption of good character, for if it does exist the court must advise the jury of it, on request of the accused; *otherwise it is of no avail to him.* The appellate judge holds (R. 83) flatly that the trial court was not required to instruct on good character, because there was no proof concerning it, and adds (R. 83):

> "All that the defendant was entitled to was a charge upon the presumption of innocence, and the necessity of the Government to overcome that presumption by proof of guilt beyond a reasonable doubt."

To support his ruling (R. 83) he cites "*State* v. *Anslinger*, 171 Mo. 489, 415; *State* v. *Gartrell*, 171 Mo. 600, 606; and *Williams* v. *People*, 166 Ill. 132, 136." He has transposed the Missouri cases in his text citations, and "415" is also wrong. Both the *Gartrell* and *Anslinger* cases were decided on the same day, and by the same division of the court. The former was an aggravated case of murder, and the judgment was affirmed, but the latter was reversed.

The Missouri and Illinois cases cited hold in effect that no presumption of good character exists in those States, and the court need not therefore charge on the subject unless the defendant has given proof. The Missouri cases were decided *under a statute* which required the court to include in its instructions "whenever necessary", one on the subject of the defendant's good character; and in the *Anslinger* case the court held that *this statute* did not require such an instruction where no evidence of good character was offered; and, further, that the testimony of good character offered in that case did not relate to the trait of character which was in issue, and that there was no testimony which, *under the statute*, made it necessary for the court to instruct the jury (pp. 608, 609) on this subject. The question of the existence of a legal presumption of good character in the absence of a statute was not even incidentally involved or considered.

The charge was election frauds (as in *Mullen's* case *infra*) but the character testimony (p. 608) related only to defendant's reputation as "a hard-working, industrious man", while the trait involved, said the court (p. 609), "was that of an honest and law-abiding citizen." The *Gartrell* case passively follows *Anslinger's*, and all said on this subject is (pp. 519-520): "As to failure to instruct on good character, there was no proof that defendant was of good character, and the statute does not require" such an instruction without such proof. The Missouri court also cites to this point *State* v. *Hopper*, 71 Mo. 430, where this question was not considered at all, but which merely decided (p. 431) that the court was not bound to instruct as to murder in the second degree when there was no evidence to warrant such an instruction. None of the Missouri cases cite any from other jurisdictions to support their rulings as to character, but only the statute and local cases. The prayers asked are not given in any instance.

In *William's* case, 166 Ill. 132, the charge was assault with intent to steal. The character prayer asked is not given. The court simply held that the trial judge was not required to instruct the jury on the question of defendant's character "as there was no evidence whatever on that question before the jury" (p. 136). Prior cases in that State had held the same rule in general, and no others were cited to this point.

The appellate judge then concludes (R. 83) this subject as follows:

> "The authorities relied on by the defendant do not go so far as to hold that the accused is entitled to such a charge as was asked, under all circumstances. *McKnight* v. *U. S.*, 97 Fed. Rep. [208] 210; *Mullen* v. *U. S.*, 106 Fed. Rep. 892. In the first of those cases the judgment was reversed because the court permitted the District Attorney, over the objection of the defendant, to comment upon his failure to prove a good character; and in the second, the court, in refusing the instruction, made remarks decidedly prejudicial to the defendant, respecting his failure to offer similar proof."

The *Mullen* case has been misread. The defendants were indicted for election frauds; they offered no proof of character, but asked the court to instruct the jury:

> "You are charged that the law presumes the good character of the accused, and such presumption is to be considered as evidence in favor of the accused, in considering the guilt or innocence of them, or any of them."

This prayer was refused, and this was the principal question on appeal, not the court's comments, which were of secondary importance, and of none at all if the refusal was right. The case was decided in 1901. The opinion, which fully decides the principal point, was written by *Mr. Justice Day*, and was concured in by *JJ. Severens* and *Lurton*, who held:

> "In a criminal trial in a federal court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed."

The court said (p. 894):

> "Does such a presumption exist? We fail to find any difference of opinion in the well recognized text writers upon this subject. All assert that a presumption exists in favor of the accused in the absence of testimony that he had a good character previous to the time of the alleged commission of the offense. It is true the government may not attack the character of the accused until he puts it in issue by affirmative testimony on his part. He is not obliged to do this, but may, if he sees fit, rest upon this presumption raised by the law."

The court quotes to these points 1 *Bish. New Cr. Pro.* (4th Ed.) section 1112, par. 2; *Underhill Cr. Ev.*, section 76; *Coffin* vs. *United States*, 158 U. S. 432, 460, and cites *McKnight, United States*, 97 Fed. Rep. (C. C. A.) 208, 210.

There are certain unmistakable signs in the opinion of the appellate judge (R. 83) which indicate quite clearly that he never read either the *Mullen* or *McKnight* case.

Recurring to the doctrine of a few isolated decisions, the court further said in the *Mullen* case (p. 894):

> "It is true that there are cases which hold that, where there is no testimony on the subject [of char-

> acter], the court is not obliged to say anything to the jury, either one way or the other. But if the presumption exists in favor of the accused, it cannot be available to him unless he can have an instruction advising the jury of this proposition of law. This presumption, to the extent to which it exists, though less important, is as much his right in a criminal trial as the presumption in favor of his innocence. It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct."

The emphatic and correct declaration of the government counsel in the court below was this (*Brief for U. S. p.* 35):

> "Unquestionably it is the law that in the absence of any testimony concerning the character of a defendant, the law presumes him to be a man of good character."

In *McKnight* v. *U. S.*, 97 Fed. Rep. 208, 211 (1899 C. C. A.), the law concerning the presumption of good character is carefully considered at some length, and the leading cases are cited. The prosecution was for embezzlement. *Mr. Justice Day* wrote the opinion, in which *JJ. Taft* and *Lurton* concurred.

In 12 *Cyc.* 412 the cases concerning good character are collected, and the author says:

> "The accused is not compelled to rely altogether upon the presumption of his good character, but must be permitted to introduce affirmative evidence thereof", if he sees fit.

The great weight and importance of evidence of good character were expounded by this court in *Edgington* v. *U. S.*, 164 U. S. 361, 366; but the exact point now presented does not appear to have been passed on by this court. The *Edgington* case, like this, involved a charge of *crimen falsi* or species thereof, namely, making a false deposition in aid of a claim for a pension.

In *Posey* v. *U. S.*, 26 App. D. C. 302 (January, 1906), the court expressly recognized the existence of the presumption of the good character of the accused in a prosecution for arson, and said (p. 307):

> "Notwithstanding the general presumption of innocence and previous good character, a defendant has the right to offer evidence of his general good character if he thinks it of importance."

In *U. S.* v. *Neverson*, 1 Mackey 153, 158, three defendants were charged with murder, two of whom gave no evidence as to their characters, and at their request the following instruction was given and approved on appeal:

> "As to the presumption of good character, the prisoners are entitled to the presumption of having sustained good characters up to the time of the alleged murder, and this presumption remains in their favor unless the jury shall believe from the evidence that they in fact were not entitled to such reputation."

In the case at bar, the character prayer is not so strong as that in the *Mullen* case, for there it was held that the jury should have been told that not only this presumption exists, but also that it "is to be considered as evidence in favor of the accused." The words of our prayer, "bound to assume", meant that the jury were bound to recognize and give proper effect to this presumption.

The same phrase, *"bound to assume"*, was used in our prayer as to the presumption of innocence (R. 62, Prayer XVI) which the court granted, and it had nothing whatever to do with the refusal of the character prayer, though the appellate judge (R. 83) thinks it did.

On a charge of *crimen falsi*, the defendant's character for honesty, uprightness and integrity is as certainly involved as his innocence, whether he offers proof of it or not. The very same reason that presumes innocence presumes good character, as said in *Mullen's* case (p. 894). The logical result of the opinion here is to destroy utterly the presumption of innocence, and the right to an instruction on it.

The opinion of the appellate judge repudiates the existence of the presumption and the right to a charge on it, as declared in the *Mullen* case, and by other courts in criminal cases, and adopts as the law the irrational and unsupported principles which he declares. His conclusion is too far-reaching, radical and dangerous, to be passed without the final consideration of this court.

Before this character prayed was refused, the presiding judge had already reflected on the accused by having charged (R. 58) that he had submitted his prayers *"in a manner that indicates that the purpose of the request is not to ascertain the opinion of this court on the law in respect to this trial, but to save some possible point for reversal in another court."* We have shown that this was error. Conceiving, perhaps, that the refusal of our character prayer gave them a license to assail the accused's character by arguments, the prosecutors made direct assaults on his character in their arguments to the jury (R. 63-65). It is unnecessary to repeat their language here, except to say that it went so far as to state (R. 65) that he *"did not even try to prove a good reputation."* In *McKnight v. U. S.*, 97 Fed. (C. C. A.) 208, 209, the conviction was reversed because the trial court permitted the prosecutor to comment on the defendant's failure to produce evidence of his character. In our case, the court recognized that the accused "did not have to" prove a good reputation (R. 65), yet refused to tell the jury so. By all the authorities, the prosecutor has no more right to assail the defendant's character by argument than by evidence, when the accused has not put it in issue. As the prosecutors' arguments to the jury (R. 63-65) in this case constituted gross misconduct, both for this reason and because they charged the accused with other offenses, the subject is more fully considered elsewhere. The cases which we have cited *supra* say that the law presumes the defendant's good character, and that he may elect to stand on that presumption; in which event the prosecution cannot assail his character by evidence, argument, comment, question, or insinuation—in short, neither by word nor act.

The charge (R. 65-70) is wholly silent as to the law of character. The cases show that a prosecutor's gratuitous assault on the character of the defendant, which he has not put in issue, is none the less reversible error because he withdraws it under pressure (R.63-65), for the weapon's withdrawal does not heal the wound.

From the proceedings in this case, it is impossible for the jury to have escaped the conclusion that *they were bound to assume that the accused was of bad character*—an assumption at war with both the law and the fact, and intensely prejudicial to the accused. The same effect was produced in the *McKnight* case, *supra*, by the comments of the Government's special counsel in his argument to the

jury concerning the failure of the accused to call witnesses to prove his good character, which comments the court refused to check (pp. 209-210). Both the court and counsel, however, expressly declared (p. 210) to the jury that the law presumes the good character of the accused. The conviction was reversed for allowing such suggestion of counsel, the appellate court concluding (p. 211):

> "Where no testimony is offered, the accused can rest upon the legal presumption of good character. * * * The suggestion of counsel, thus approved by the court, may be more detrimental to the rights of the accused than any testimony that could be adduced against him. In effect, it not only destroys the presumption in his favor, but permits an inference that his character is bad because he has not adduced proof to the contrary. * * * Sound principle, as well as the weight of authority, concur in holding such comments, approved by the court, to constitute such substantial error as requires a reversal and new trial."

XIII. MISCONDUCT OF PROSECUTORS.

The indictment (R. 1-2) in form charges the accused with the offense of embezzlement of a certain single sum of money on a certain day, but no evidence whatever was offered to prove this charge as laid, and the record so recites (R. 40) in terms. In their arguments to the jury, *based upon no evidence whatever*, and over the objections and exceptions of the accused, the then prosecutor and his then assistant expressly charged (R. 63-65) the accused with (1) being "a common thief", (2) depositing these trust funds to his private bank account, (3) "forgery", (4) "treating people as a physician", (5) "trying to break into" the medical profession, (6) maltreating his clients as a lawyer, and (7) stealing dead men's money from widows and wards. Not content with this vitriolic vituperation they further charged him with (8) posing under an assumed name, (9) being a fugitive from justice, (10) not even trying "to prove a good reputation", (11) being a lawyer, and (12) conducting his own defense.

In addition, the said assistant, during his argument, showed the

jury (R. 64) all of the endorsements on the checks against account 35191, which endorsements (except only those of the accused) the court had ruled out (R. 41, top). Each check (R. 64) was "handed separately to the jury, and they examined both sides thereof", over the objection and exception of the accused.

(1) There was nothing to excuse the charge (R. 63) that the accused was "a common thief". To be such is a substantive offense of itself. *World v. State*, 50 Md. 49, 54. This charge, therefore, was that the accused was guilty of an offense distinct and independent from that for which he was supposed to be on trial. There was nothing to warrant the assertion (R. 64) that the accused had deposited these trust funds to his private account, or that Eckloff's testimony (R. 40) meant any such thing, for it related only to a statement of the accused concerning his endorsement of Lipscomb's name on the certificate of Nov. 8, 1901. There was nothing to justify the charge (R. 64) of forgery by Fields of Lipscomb's name on the certificate just mentioned, but the proof (R. 40) conclusively showed that there was no forgery. There was nothing to support the assertion (R. 64, bottom) that the accused was "treating people as a physician", and the testimony (R. 48) of Tyser, upon which the said assistant perhaps based this statement, lends no support to it, even if true (which it is not), for one who answers once to the title of "Doctor" is not necessarily engaged in "treating people as a physician", or "trying to break into another honorable profession", as charged (R. 64). There are more kinds of doctors than this young assistant ever dreamed of. There was nothing to warrant the charge (R. 64) that as a lawyer the accused had maltreated his clients. There was nothing to justify the assertion (R. 65) that he had stolen dead men's money from widows and wards. There was not a word of evidence concerning dead men's money or widows and wards or stealing from them or anyone else. There was nothing to support the charge (R. 64) that the accused was a fugitive from justice, and detective Tyser's testimony (R. 48), upon which this statement was supposedly based, does not justify it. The charge (R. 64) that the accused was posing under an assumed name rests only upon the bare and uncorroborated statement of detective Tyser (R. 48) that the accused, on one occasion only, answered to such a name. The charge (R. 65) that the accused "did not even try to prove a good reputation", was inexcusable from any view-point. Equally so was

the harping (R. 65) on the fact that the accused was a lawyer, whose "counsel have day after day stood in this court like phonographs, the passive mouth-pieces of the defendant, who has conducted his own defense."

These arguments were direct appeals to the passions and prejudices of the jury, they were direct attacks on the character of the accused concerning which no testimony had been given, they were reflections on his failure to testify, they were utterly unwarranted and inexcusable, they were highly improper and intensely prejudicial, they were deliberate and intentional, and they were made and meant to convict at any cost. A comparison of these violent and irrational arguments with the rest of the record will show how wild and unfair they were. Many of these intolerable statements directly charged the accused with guilt of grave crimes other than that alleged in the indictment.

In *Waldron* v. *Waldron*, 156 U. S. 361, the court said (p. 380):

> "It is elementary that * * * the assertion by counsel, in argument, of facts, no evidence whereof is properly before the jury, in such a way as to seriously prejudice the opposing party, is, when duly excepted to, also ground therefor [reversal]."

In *U. S.* v. *Williams*, 168 U. S. 382, the accused was indicted for extortion as an inspector of Chinese. The prosecutor said: "No doubt, every Chinese woman who did not pay Williams was sent back". This court said (p. 398):

> "The observation made by the prosecuting attorney was, under the circumstances, highly improper, and not having been withdrawn, and the objection to it being overruled by the court, it tended to prejudice the right of the accused to a fair and impartial trial for the particular offense charged."

In *Hall* v. *U. S.*, 150 U. S. 76, the accused was indicted for murder. The prosecuting attorney argued to the jury that the defendant had committed another murder in another State. This court said (pp. 80, 81, 82):

> "If the defendant had murdered the negro in Mississippi, and had been convicted therefor, evidence,

either of the murder or conviction, would have been incompetent to support the indictment against him for the murder of Yates in Arkansas. *Boyd* v. *United States,* 124 U. S. 450, 458. * * * .

"The attempt of the prosecuting officer of the United States in induce the jury to assume, without any evidence thereof, the defendant's guilt of a crime of which he had been judicially acquitted, as a ground for convicting him of a distinct and independent crime for which he was being tried, was a breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court, and the jury directed to allow it no weight.

"The presiding judge, by declining to interpose, notwithstanding the defendant's protest against this course of argument, gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial. *Wilson* v. *United States,* 149 U. S. 60, 67, 68."

The following cases are directly in point: *Long* v. *State,* 81 Miss. 448, 453. *People* v. *Derbert,* 138 Cal. 467, 470. *Taylor* v. *State,* 27 Tex. App. 463, 465. *State* v. *Irwin,* 9 Idaho 35, 38. *People* v. *Montgomery,* 176 N. Y. 219, 230. *Tijerina* v. *State,* 45 Tex. Cr. Rep. 182, 183. *McDonald* v. *People,* 126 Ill. 150, 153. *Flint* v. *Com.,* 81 Ky. 186, 187. *State* vs *Shepard,* 49 W. Va. 582, 589. *Cargill* v. *State,* 12 Ky. Law Rep. 149, 151. *State* v. *Kirby,* 62 Kan. 436, 443. *State* v. *Reilly,* 4 Mo. App. 392, 394.

In 12 *Cye.* 571-578 the cases are collated to the point that it is error for the prosecutor to assert, in argument to the jury, facts and circumstances of which there is no evidence.

It is just as prejudicial error to ask questions, make charges, statements, insinuations, comments or arguments, for the purpose of creating the impression on the jury that the defendant has been guilty of other offenses, as to give inadmissible evidence of them to the jury; and likewise to assail the defendant's character when he has not put it in issue. The injury is so vital and permanent that even *the court's rebuke is not sufficient to cure the error. Boyd* v. *U. S.,* 142 U. S. 450, 458. *People* v. *Derbert,* 138 Cal. 467, 470. *Car-*

gill v. *State*, 12 Ky. L. Rep. 149, 150. *People* v. *Jacks*, 76 Mich. 218, 221. *Welhousen* v. *State*, 30 Tex. App. 623, 626. *Wolfson* v. *U. S.*, 102 Fed. 134, 137. (C. C. A.). *Tijerina* v. *State*, 45 Tex. Cr. Rep. 182 (bottom). In *Hopt.* v. *Utah*, 120 U. S. 430, the court said (p.438):

> "There may be such strong impressions made upon the minds of a jury by illegal and improper testimony, that its subsequent withdrawal will not remove the effect caused by its admission; and in that case the original objection may avail on appeal or writ of error."

(2) The assistant prosecutor's assertion (R. 65) that the accused "did not even try to prove a good reputation", was grave error. *McKnight* v. *U. S.*, 97 Fed. Rep. (C. C. A.) 208, 209. *Mullen* v. *U. S.*, 106 Fed. Rep. 892, 894. *Allen* v. *U. S.*, 115 Fed. Rep. (C. C. A.) 3, 12.

On objection, the trial judge (R. 65) said that the defendant "did not have to" prove a good reputation, and mildly suggested "that the remark ought to be withdrawn"; and counsel then withdrew it. In *Wilson* v. *U. S.*, 149 U. S. 60, 67, a similar reflection was made on the accused's failure to testify, but was immediately withdrawn on his objection and the court's mild suggestion; nevertheless this court held it fatal error, quoting (p. 69) from *Com.* v. *Scott*, 123 Mass. 239, 240, 241, and *Austin* v. *People*, 102 Ill. 261, 264. The case of *Barnard* v. *State*, 86 S. W. Rep. 760, 761 (Tex. Cr. App. 1905), is directly to the same effect. See also *State* v. *Taylor*, 57 W. Va. 228, 234.

It was the immediate and imperative duty of the trial judge, as pointed out in *Wilson's* case (p. 67), "to express to the jury in emphatic terms that they should not attach to the failure any importance whatever"; but he said not one word to them to this effect.

By its terms, the federal evidence act involved in *Wilson's* case, applies to the District of Columbia, and it is excepted from the repeal provisions of the Code D. C. by section 1640 thereof.

In *Waldron* v. *Waldron*, 156 U. S. 361, the trial court ruled against counsel's argument of a certain inference which had been excluded (pp. 364, 367), and by the general charge told the jury to disregard the inference sought to be drawn by counsel (p. 368); yet this court, quoting (p. 383) from *Hopt* v. *Utah*, 120 U. S. 430, 438,

to this point, held the improper argument reversible error, as it was not cured (pp. 382-383) even by the rulings and charge.

On objection sustained (R. 65), the assistant prosecutor also withdrew his statement (R. 65) following:

> "And you have seen, gentlemen, how the case has been fought. Counsel have day after day stood in this court like phonographs, the passive mouthpieces of the defendant, who has conducted his own defense."

It is not uncommon, but most reprehensible, for counsel to make statements to, or in the presence of the jury, which they well know are improper and prejudicial, with the expectation of being compelled to withdraw them, after they have done the intended harm. It is an imputation on ordinary intelligence to state, and it is quite impossible to believe, that the prosecutors in this case did not know the gross impropriety of at least some of their assertions to the jury; and both they and the court certainly knew that the accused was entitled to a fair and impartial trial, to the assistance of counsel, to compulsory process for his witnesses, and to be informed of the nature and cause of the accusation against him; yet he was deprived of all of these constitutional rights in this case, and then blamed for such deprivation.

In *Ex. p. Lange*, 18. Wall. 163, this court said (p. 178):

> "There is no more sacred duty of a court than, in a case properly before it, to maintain unimpaired those securities for the personal rights of the individual which have received for ages the sanction of the jurist and statesman; and in such cases no narrow or illiberal construction should be given to the words of the fundamental law in which they are embodied."

In *Allen* v. *U. S.*, 115 Fed. Rep. 3 (C. C. A.), the court said (p. 12):

> "All men stand equal before the law, and have the same constitutional rights and privileges. The high and the low, the poor and the rich, the criminal and the law-abiding, when indicted are entitled, under the law, to a fair and impartial trial. This is a sacred boon guaranteed to every person, and of which no one should ever be deprived. The law, in its extended reach,

> power, and influence, is as tender of the rights of the man who is supposed to be bad as it is of the liberties and rights of the man who is believed to be good."

It is indeed idle to say that the injury which these confessedly improper remarks caused the accused, was eliminated by their formal withdrawal under objection and judicial suggestion. As well can the trial judge obliterate from the minds of the jurors, by his mere statement, or the wave or brush of his hand, the stains of an upset well of ink on a juryman's shirt front. *The harm was done, and there it remained.* The cases which we have cited, both civil and criminal, show that the withdrawal of these two prejudicial assertions did not cure the error. No others were withdrawn.

In *Waldron* v. *Waldron,* 156 U. S. 361, in speaking of the improper argument of counsel, which was attempted to be corrected by the trial judge, this court said (p. 383):

> "There is an exception, however, to this general rule, by virtue of which the curative effect of the correction, in any particular instance, depends upon whether or not, considering the whole case and its particular circumstances, the error committed appears to have been of so serious a nature that it must have affected the minds of the jury despite the correction by the court. * * *
>
> "The case here, we think, comes within the exception."

(3) The assistant attorney's conduct (R. 64) in showing the jury the ruled-out (R. 41) endorsements on the checks against account 35191, was improper, for in this way he got before them matters that were not in evidence in the case. A somewhat similar question arose in *Waldron* v. *Waldron,* 156 U. S. 361, concerning counsel's argument from certain papers which had been offered in evidence for "the general purposes of the cause", but had been rejected for such purposes, just as all endorsements on the checks mentioned (except of the accused) had been ruled out; and this court said (p. 382):

> "The question * * * is * * * whether, having been rejected for such purposes, it was competent for the plaintiff to use them in direct violation of the restriction placed upon their use. If

> error was committed in restricting the use of the evidence, the plaintiff's remedy was to except thereto, and not to disregard the ruling of the court and use the evidence in violation of the conditions under which its admission was secured."

Section 935 Code D. C. gives the United States the same right of appeal in all criminal prosecutions that is given the accused, "including the right to a bill of exceptions".

In view of his prior ruling rejecting all endorsements on the said checks, excepting of the accused, we are at loss to account for the trial judge's overruling of our objection to the assistant prosecutor's exhibition to the jury of these checks and excluded endorsements. They were most certainly inadmissible for the reason (R. 41, top) of their rejection—because they were absolutely unproved.

(4) The court below says (R. 83) that the arguments of the prosecutors "contain much invective against the defendant"; that "he was denounced as a common thief, and as one who had robbed the widow and orphan"—and then adds parenthetically, but without the slightest support of the record—"(who were among those claiming participation in the final distribution of the funds as preferred creditors of the Endowment Association)". Where are "the widow and orphan" in this record? It was their very absence that in part caused our objection to the prosecutor's reference (R. 65, bottom) to them. The court cites (R. 84) *State* v. *Gartrell*, 171 Mo. 489, 512, to support its conclusion that the foregoing remarks "do not amount to reversible error". The case is one of those previously cited (R. 83) by the court below concerning the law of good character; but in it the court held (p. 512) that the objectionable remarks were fully supported by the proof and confined strictly to the charge of the indictment; and said further (p. 512) that to the remarks of counsel—

> "no objection whatever was made, and no exception saved; * * * as no objection was made it is of course not before us for review".

Every remark of which we complain was promptly objected to and exception was saved (R. 63-64, Ex. 47; R. 64, Ex. 48; R. 64, Ex. 49; R. 64, Ex. 50; R. 64, Ex. 51; R. 65, Ex. 52; R. 65, Ex. 54).

These improper arguments were also specifically made a material part (R. 21, par 7) of our motion for new trial.

The court below says (R. 83) of the *Gartrell* case that it "is well considered, and the very point here made is ably discussed and, we think, properly decided." In view of the statements of that court and the language above quoted from that case itself in its reference to the objectionable remarks of the prosecutor, we have some difficulty in perceiving its authority and application here, and a critical reading of it only increases this difficulty. The cases decided by this court are controlling.

The court below then says (R. 84) that "when counsel went outside of the case to say that 'defendant did not even try to prove a good reputation', the court promptly intervened saying that he did not have to, and that the remark should be withdrawn." The court did not intervene promptly nor at all until the accused objected (R. 65) to the remark, and then the objection was not even sustained, but the court merely made the mild suggestion that "the remark ought to be withdrawn."

The court below further says (R. 84) that "counsel then immediately withdrew the remark. No further action was asked of the court, and this is all that he could well have done under the circumstances"; to which he cites *Lorenz* v. *U. S.*, 24 App. D. C. 337, 391, and *Yeager* v. *U. S.*, 16 App. D. C. 356, 362.

But it is wholly unnecessary for the accused to ask any further action of the trial judge, and it was very far from being "all that he could well have done under the circumstances", as emphatically pointed out in *Hall's* case (p. 81) and *Wilson's* case (p. 67); for his duty called for immediate and strong action, but was met with mere inaction. We believe that the withdrawal of this and the one other statement did not cure the error, even if this had been a purely civil cause. A trial judge owes not merely a passive but an active duty to the accused, and it is not necessary that he must object or make requests in every instance in order to get the judge to act in his behalf, at the peril of his life or liberty.

Simple comparison of the improper arguments in this case with those in the *Lorenz* and *Yeager* cases, is sufficient to show that they have nothing in common, but indeed are quite alien.

In the *Yeager* case, no exception was taken to the prosecutor's statement, but the court directed the jury to disregard the state-

ment, and not to consider counsel's remark. In the *Lorenz* case, the court interrupted counsel of its own motion; no exception was saved, and the incident was not mentioned in the motion for new trial. The court said (p. 391):

> "Had the court, instead of interrupting counsel, permitted him to continue this line of argument, the judgment would have to be reversed."

The court below does not cite *Capital Construction Co.* v. *Holtzman*, 27 App. D. C. 125. In that case, it is held that when incompetent evidence is admitted, the error is not cured by an instruction to the jury to disregard it, the court saying (pp. 132-133):

> "Even if the jury had been told to disregard the testimony, and it had been stricken from the record, the error would not have been cured."

It is further held that when incompetent evidence is admitted over objection, and when commented on by counsel who adduced it, in addressing the jury, such comment is objected and excepted to, and counsel offers to withdraw it if objected to, but it is not withdrawn and the jury is not instructed to disregard it, such error is committed as to justify reversal, especially where it appears that the action of counsel in making such comment is specifically set forth as one of the grounds of a motion for a new trial, because (p. 139) "the evil had been done". Of the *Yeager* case the court said (p. 139):

> "In the *Yeager* case the court directed the jury to disregard the statement and directed them not to consider counsel's remark. Furthermore there was no exception taken in that case."

Of the *Lorenz* case, in which the trial judge interrupted counsel, the court said (p. 139):

> "We said had he not done so, and had he permitted him to continue the line of argument objected to, the judgment would have had to be reversed. It further appeared that the incident was not mentioned in any of the grounds set up in the motion for new trial."

Recurring to the case then under consideration, the court concluded (p. 139):

> "Here the action of counsel for plaintiff in making the statement is specifically set out as one of the grounds upon which the motion for new trial was founded. We conclude the assignment of error based upon the remark of counsel, and the proceedings following it, is well founded."

The court below has thus itself in part distinguished the instant case from those of *Lorenz* and *Yeager*, and brought it within the principle of the *Waldron* and other cases in this court, and of the *Holtzman* case in the court below, in which (p. 139) the *Waldron* case was cited and followed.

(5) The most improper and prejudicial remarks made by counsel for the Government in the case at bar were not only not withdrawn, nor offered to be withdrawn, but our objections to them were overruled, and exceptions were duly reserved. Of no less than twelve intensely objectionable statements to the jury, the court below mentions but two which were excepted to, and but one which was withdrawn, and remains inexplicably silent as to those which charge the accused with (*a*) depositing these trust funds to his private bank account, (*b*) "forgery", (*c*) "treating people as a physician", (*d*) "trying to break into" the medical profession, (*e*) maltreating his clients as a lawyer, (*f*) posing under an assumed name, (*g*) being a fugitive from justice, (*h*) being a lawyer, and (*i*) conducting his own defense. *Was there no prejudicial error in these arguments of the prosecutors to the jury.* Why does the court below ignore them?

We have already referred to the conduct of the prosecutor in stating to the trial court that the original certificate of incorporation had been lost, etc., when he had the paper purporting to be the original in his own possession at the time he made the statement, and knew it, or should have known it. (R. 42, bottom; R. 21, Pars. 6, 7; R. 22-23, affidavit of Fields; R. 23, affidavit of Walker; R. 24, affidavit of Baker; R. 25-26, affidavit of Smith).

The trial judge in this case said not one word to the jury to disregard the remarks that were withdrawn, and he put the stamp of his approval upon all of those which were not withdrawn and to which we objected and excepted.

In view of the prosecution's evidence and arguments in this case, *of what has the accused been convicted?*

In *Allen* v. *U. S.*, 115 Fed. Rep. 3 (C. C. A.) the court said (pp. 12, 11):

> "The trial of every man should be free from undue prejudice or odium, especially upon the part of all officers clothed with the power and charged with the duty of administering the law in such a manner as to reach the ends of justice and right. • • • We have had occasion altogether too often to condemn the failure of justice brought about by the reckless conduct of officers, whose sworn duty it is to conduct prosecutions legally, and in conformity with settled principles. • • • Nothing can bring more contempt and suspicion on the administration of justice than the failure of its ministers to respect justice."

XIV. BILL OF EXCEPTIONS.

The bill of exceptions in this case is framed in strict accordance with the requirements of Code D. C. section 73, and of Rule V, sections 4 and 5, of the court below, and of the controlling decisions; and it is conclusive on this writ of error. *Kelly* v. *Moore*, 22 App. D. C. 1, 6. It contains, and must be taken to contain, the substance of all of the evidence and proceedings in the case having relation to or in any wise connected with our exceptions, as the same are therein set forth, although there is no recital of this fact in so many words. In *Byrne* v. *Morrison*, 25 App. D. C. 72, 76, the court said, "be that as it may, we must accept the bill of exceptions, which cannot be corrected"; and in *Talty* v. *D. C.*, 20 App. D. C.. 489, 491, the court said that "every reasonable presumption will be indulged in favor of the regularity of a bill of exceptions that the record will permit."

The exceptions in this bill appear in unbroken numerical sequence from the first to the last, and the substance of all of the evidence and proceedings is recited chronologically in the order of its introduction and their occurrence. The frame of the bill not only excludes the probability but also the possibility of other evidence.

This bill of exceptions opens with several preliminary motions and the rulings thereon (R. 28-29). Then it recites the arraignment and plea (R. 29): then another motion and its denial (R. 29); then the empanelling and swearing of the jury (R. 29); that the U. S. Attorney opened to the jury, but the defendant made no opening at any time (R. 30). The bill then proceeds as follows: "In order to maintain the issue on its part joined, the United States then offers as a witness Samuel McComas Hawken, who, being first duly sworn, testifies", etc. (R. 30). This is followed by many (17) pages of oral and documentary evidence with this witness on the stand. Then follows the testimony of various other witnesses for the United States, including Young, Parker. Eckloff, Pinchback, Schayer, Donaldson, Tyser, Robinson and Padgett, that of each being preceded by a statement in form similar to this:

"The United States then offered as a witness in its behalf Dr. Young, Secretary of the Franklin Fire Insurance Company, who, having been duly sworn", testified as then recited (R. 37). At the close of the testimony of the last Government witness named (Padgett, R. 53) is this statement (R. 53): "At this point the U. S. Attorney, Mr. Beach said: 'The Government rests, if it please the court.'" The bill then recites (R. 54) that "thereupon the defendant moved the court to strike out all the evidence offered by the Government tending to prove by secondary evidence the existence of a charter of the Washington Beneficial Endowment Association, because" of certain reasons stated, "but the court overruled the motion; to which ruling the defendant duly reserved his Exception 28." The bill then (R. 54) proceeds: "The defendant then called John Joy Edson as his witness, who, having been duly sworn, testified," etc. This is followed by Edson's testimony (R. 54) and that of two other witnesses, Mead (R. 54-55) and Wall (R. 56). Then occurs this recital (R. 56): "The foregoing is the substance of all the evidence offered by the defendant, who thereupon rested. The Government then announced that it had *no further* evidence to offer." Then follows a motion (R. 56) by defendant to discharge the jury, which motion was denied. The prayers of the respective parties were then handed up (R. 57). The bill then recites (R. 59) that "the defendant then moved the court to instruct the jury on all of the evidence in the case to return a verdict of not guilty, because," etc. This is followed by five specific prayers (Defendant's Prayers, I-V,

R. 59), each of which is based on "all the evidence in the case," for a verdict of not guilty, two of which (II and III) were granted and the others refused and exceptions reserved. Almost all of the defendant's other prayers (R. 59-63) were more or less founded in effect on all the evidence in the case; and the arguments (R. 63-65) and charge (R. 65-70) were likewise supposed to be so founded.

These motions and prayers founded on "all the evidence in the case" are not only worthless but also senseless, unless this bill contains the substance of all the evidence; and otherwise they would not be here at all.

That this bill will be taken to contain all the evidence in the case, for the purposes of this writ of error, has been so finally settled by this court on bills much less conclusive than ours, that we need only refer to the latest opinions, and ask a comparison of our bill with the bills in those cases. In *Clyatt* v. *U. S.*, 197 U. S. 207, 220, the defendant was indicted and convicted for returning certain negroes to a state of peonage, in violation of the federal statutes made in pursuance of the Thirteenth Amendment. The bill of exceptions embodied no affirmative statement that it contained all the testimony; and this omission was considered at length and held not to be fatal; but, on the contrary, the court held, on an inspection of the bill, that it must be taken as containing all the evidence, especially as it was a criminal case; and, on this view, reversed the conviction for a plain error not assigned in the trial court nor made the subject of any exception. The court reviewed fully the prior case of *Gunnison Co.* v. *Rollins*, 173 U. S. 255, 261 (bottom).

"In the absence of a positive statute or a rule of court to the contrary, a recital or certificate need not state in express terms that all the evidence is set out. It is sufficient if it affirmatively appears from a reasonable construction of the language used that all the material evidence is preserved." 3 *Cyc.* 168. If an instruction is given which is erroneous under any conceivable state of facts, it may be reviewed, though the evidence is not set out. *Frost* v. *Grizzly*, 102 Cal. 525, 527. Where a ruling of the trial court is erroneous on the evidence set out, regardless of what other evidence might have been introduced, it is of no consequence that the record does not purport to state all the evidence. *McKissock* v. *Witz*, 120 Ala. 412, 417.

"We may assume that the record contains the substance of all the testimony given in the case, although it does not in terms purport to do so." *McCaully* v. *U. S.*, 25 App. D. C. 404, 409, citing *Gunnison Co.* v. *Rollins*, 173 U. S. 255, 261. "A preliminary question has been raised here by the appellee, on whose behalf it is contended that the record does not purport to contain the whole testimony in the case, or the substance of it. * * * Of course, testimony not bearing upon the rulings—as, for example, medical testimony as to the nature and extent of plaintiff's injuries—need not be given. But although the record in the present case is not free from just criticism in this regard, yet we think, in view of its general tenor, that it should be accepted as sufficient. It states, after the detail of the testimony of witnesses on both sides, that 'counsel for both plaintiff and defendant announced that they had no further testimony to offer, and rested their case.'" *Klopfer* v. *D. C.*, 25 App. D. C. 41, 43, 44.

> "In our opinion the bill of exceptions in this case substantially complies with that requirement. It purports to recite the evidence in the order of its introduction, giving the name of each witness. This evidence is given at length in each instance, and frequently recites both the questions and answers." *Rockwell* v. *Capital Traction Co.*, 25 App. D. C. 98, 110, 111.

In the trial court it was stipulated in writing by the then counsel for the Government that this bill contains the substance of all the evidence in the case having relation to or in any wise connected with our exceptions; but it was asserted in the court below by counsel for the Government (*Brief for U. S.*, pp. 4-6) that it cannot be so taken, owing to the want of a recital to that effect; and because the court charged (R. 68) on certain letters not recited in the bill; and because the identified report (R. 37) of Nov. 23, 1903, was not recited in the bill as having been put in evidence.

The opinion of the court below (R. 82) is that the bill does not contain the substance of all the evidence, which, as we have said, is recited chronologically and in unbroken numerical sequence to the final declaration (R. 53):

> "At this point the U. S. Attorney, Mr. Beach, said: 'The Government rests, if it please the court.'"

After we closed, he at once said (R. 56) that the Government "had no further evidence to offer." The opinion below ignores the first statement, but quotes the second. By the certificate (R. 71) the trial court certifies the evidence in this bill to the end "that the questions raised by the foregoing exceptions may be reviewed and determined on appeal." The certificate and bill are senseless and useless and mean nothing if not that all the evidence is here. The opinion below is that this bill "can not be so taken, because it is apparent from the charge of the court that certain letters of the defendant were offered," etc., "and the same are not recited or mentioned in the bill of exceptions."

The cases which we have cited show that the absence of a recital in terms that the bill contains the substance of all of the evidence is not fatal to its being so taken; and we think *Clyatt's* case conclusive of this bill.

As to the receivers' report of Nov. 23, 1903, which was identified (R. 37), it is clear that it was not then put in evidence. Toward the close of the Government's evidence this report is again referred to (R. 45-46), and its counsel then said (R. 45, bottom), "I have not offered it yet." From this point, the bill proceeds with absolute and exclusive regularity to its close. It is impossible for this report to have been put in evidence after this, or at any time, with or without objection and exception, and this bill not show it. Three other similar reports were put in evidence (R. 34-35) over objection and exception, as the bill recites. These reports were utterly inadmissible under section 860 *R. S. U. S.*, if for no other reason, and that of Nov. 23, 1903, was subject to the same objection, and especially so, as the Government's counsel below said of it (*Brief for U. S.*, p. 6) that—

> "it is clear, from an examination of the indictment and a reading of so much of the testimony as appears in the bill, that this account of the receivers of November 23, 1903, was the pivotal fact in the case—was, indeed, the keystone of the whole prosecution."

The bill of exceptions shows that counsel merely neglected to put it in evidence—a not uncommon occurrence. In view of the above statement of counsel, the court below should have reversed this judgment; but that court in its opinion did not even notice the as-

sertion, although it did not specify any particular report in its references (R. 80, 81) to the "reports", and, in all probability, considered the omitted report as in evidence, like many other material facts stated in the opinion, but wholly alien to this record.

As to the alleged letters referred to in the general charge of the trial judge (R. 68-69) and mentioned by counsel, and which the court below gives as its principal reason for rejecting this bill as complete, the letter is twice recited in the bill (R. 53, bottom, and R. 64, bottom), and its substance as recited speaks for itself. It is elementary that the bill controls the charge. In *Gassenheimer* v. *U. S.*, 26 App. D. C. 432, the same trial judge who sat in this case, charged the jury as to personal hostility of impeaching witnesses, but the bill of exceptions recited no evidence of such fact. The court (*per* Shepard, Ch. J.) said (p. 447):

> "It was suggested in the argument, that the cross-examination of the impeaching witnesses developed that they were actuated by personal hostility, and had in fact given their individual opinions rather than those entertained in the community. We find no such evidence in the record, and, as the charge was excepted to properly, we must hold that it was erroneous."

The same point arose in *Clem* v. *State,* 31 Ind. 480, and the court said (p. 481):

> "Then the court in its instructions told the jury that the defendant had, during the progress of the trial, admitted certain important facts, and that the facts thus admitted must be taken as if proved beyond a reasonable doubt. Now, if such admissions were made, they were evidence, and yet a bill of exceptions purporting to contain all the evidence is wholly silent as to such admissions having been made. We must look to the bill of exceptions for the evidence, and (though we may apprehend that there was an oversight in this respect in making it up) we are compelled to hold, as the record stands, that there was no warrant for the statement of the court."

The same principle is expressly recognized in *Waldron* v. *Waldron,* 156 U. S. 361, 382.

In every other respect, except only as to the alleged "letters" (and possibly the report of Nov. 23), the court below treats this bill as regular and complete. It seemed to be conclusive on the accused but not on the Government or the court, for alien matters are assumed to have been put in evidence whenever necessary to support the conviction, though the bill is silent as to them, and shows no room or place where they could have been received. Any other evidence in the case would necessarily have broken or destroyed or altered the present numerical sequence of the exceptions—especially such as it has been said and held below was received.

Without assuming a case as made that was not made, the evidence actually given in this case is wholly insufficient to prove any single one of the essential elements of the offense alleged, let alone the crime in its entirety. We ask nothing more than a comparison of this bill with that in *Clyatt's* case, in order to show that our bill must be taken as complete and conclusive.

XV. THE JUDGMENT.

The judgment (R. 26-27) is subject to grave criticism. We have already noted that the trial court added labor, as to which the statute is silent, and that the court below modified the judgment by striking out this addition (R. 85) as unwarranted (R. 84), and because its rejection is of no practical consequence (R. 84) to the accused and does not necessitate reversal (R. 84). If the unwarranted addition made the judgment void, the court below could not modify it so as to make it valid. *In re Graham,* 138 U. S. 461, this court said (p. 463):

> "It is undoubtedly the general rule that a judgment rendered by a court in a criminal case must conform strictly to the statute, and that any variation from its provisions, either in the character or the extent of punishment inflicted renders the judgment absolutely void."

In *Whitworth* v. *U. S.*, 52 C. C. A. 214, the judgment in embezzlement was reversed because costs were added, and the court said (p. 216):

> "In the national courts a judgment in a criminal case must conform strictly to the Act of Congress which authorizes it. Any departure from the statute in the extent or character of the punishment adjudged constitutes an error which is fatal to the judgment."

The judgment contains no adjudication of guilt or conviction, no statement of the offense or any offense, no mention of any verdict, and no adjudication of innocence or acquittal on the three counts. It could not be pleaded in bar of another prosecution for the same offense without being supplemented by the whole record and all the evidence. *Paley on Convictions* (London, 1904) says (p. 274):

> "The judgment consists of two parts, viz., the adjudication of conviction, and the sentence or award of punishment."

To the same effect: *Gaither* v. *State*, 21 Tex. App. 527, 538. 19 *Ency. P. & P.* 471-483. The caption is no part of the judgment. See *Jackson* v. *Ashton*, 8 Pet. 148, 149. *Harris* v. *Leonhardt*, 2 App. D. C. 318, 320.

Another objection is to that part which leaves it to the Attorney-General to designate the prison. As some prisons require hard labor and others do not, and as federal prisoners in state prisons are subject to the same discipline as state prisoners (*R. S. U. S.* section 5539), this judgment leaves it to the discretion of the Attorney-General to add hard labor in effect to this judgment (R. 84, bottom), though the statute is silent; but it is elementary that neither Congress nor courts can confer judicial powers upon him. *Constitution U. S.*, Art. 3, Sec. 1. *Martin* v. *Hunter*, 1 Wheat. 304, 330. A similar question arose in *Ex. p. McClusky*, 40 Fed. Rep. 71, 73, concerning the right of the Attorney-General to determine the infamous or non-infamous character of the offense by his designation of the prison. It is for Congress alone to declare the punishment of crimes, and for courts to award it.

XVI. CONCLUSION.

We most earnestly submit that the accused has been summarily denied the rights guaranteed him by the Constitution and laws of the land; that he has been most cruelly and unjustly put to con-

viction of an infamous crime without any reasonable chance whatever to defend himself; that his every proper request or objection was invariably met with monotonous denial; and that the judgment should be reversed either on the writ of error or on the writ of certiorari if the former be untenable, and the cause remanded with the directions proper in the premises.

FRANK J. HOGAN,
JOHN C. GITTINGS,
Attorneys for Plaintiff in Error and Petitioner in Certiorari.

HENRY E. DAVIS,
Counsel.
Washington, D. C.
January, 1907.

In the Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

THOMAS M. FIELDS,
Plaintiff in Error,
vs.
THE UNITED STATES.

No. 395.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT OF CASE AND ASSIGNMENT OF ERRORS.

STATEMENT OF CASE.

This case comes up from the court of appeals of the District of Columbia on a writ of error allowed by a Justice of this court, to review a judgment of that court affirming a judgment of the supreme court of the District of Columbia effecting a statutory forfeiture by the plaintiff in error of at least one-half of $10,070.82, and his imprisonment in the penitentiary for five years, for the alleged crime of embezzlement

assumed to have been committed by him as a chancery receiver; but this crime is not properly averred in the indictment, it has not been committed at all, the evidence utterly fails to prove it, and of it the trial court had no jurisdiction whatever.

The plaintiff in error and Andrew A. Lipscomb were jointly indicted as chancery receivers, in the supreme court of the District of Columbia, on a charge of embezzlement. A severance was had, and the former was railroaded to conviction for what it is impossible to say, but several months later the latter was properly tried and promptly acquitted, and therefore his name does not appear in the opinion of the court below. The plaintiff in error was sentenced to be imprisoned and kept at labor in the penitentiary for the period of five years. He appealed to the court of appeals of the District of Columbia, and on May 1, 1906, that court modified the sentence (R. 85) by striking out the words "at labor," and as so modified affirmed it.

This judgment (if valid) carries with it as the direct, immediate, and inexorable effect under the statute, the absolute forfeiture by the accused of all his right and claim to his commissions, costs, and charges on the receivership fund, which (R. 36) commissions, etc., amount to $10,070.82, and which, to the amount of about ten thousand dollars (R. 36), had been adjusted and allowed by the chancery court nearly one year before Congress passed the law upon which this prosecution is based, and nearly two years before the law took effect, and all of which (R. 36) had been so adjusted and allowed long before this indictment was filed. The statute requires a forfeiture by the accused of "all right or claim to any commissions, costs, and charges" on the trust fund, thus including both paid and unpaid commissions, etc., inasmuch as "right" refers to the former and "claim" to the latter.

The defendant in error has filed a motion to dismiss for the want of jurisdiction, together with a special brief in sup-

port thereof; to which the plaintiff in error has filed a special brief in reply. The plaintiff in error has also filed herein his petition that the writ of *certiorari* shall issue if the writ of error shall be found untenable, together with a brief and argument on the merits in support thereof; to which the defendant in error has filed a brief in opposition. Both the motion and petition were duly submitted to the court on January 21, 1907, but on January 28, 1907, they were postponed to the hearing of the case on its merits.

The defendant in error has also filed a motion to advance, in which the plaintiff in error has concurred; and this motion was also submitted to the court on February 4, 1907, and on February 25, 1907, it was granted, and the case was advanced for hearing on Monday, March 11, 1907, after the cases already assigned for that day.

In order to avoid duplication of printing, at the hearing on the merits the plaintiff in error, with the court's approval, and with the consent of opposing counsel, will rely upon and use his aforesaid briefs on the jurisdiction and merits, augmented and completed by the statement of case and assignment of errors herein set forth.

For convenience of reference, uniformity of arrangement, and use to some extent as an analytical index to the aforesaid brief on the merits, which is now preceded by a general subject-index, the errors herein assigned are assembled under the titles and numbers and in the order of the subjects considered in that brief. At the end of each error assigned, reference is given to the brief for the discussion of the point made. Record references are also given where useful, but they will always be found in detail in the pages of the brief.

On March 3, 1901, Congress passed "an act to establish a code of law for the District of Columbia * * * to go into effect and operation from and after the first day of January, in the year of our Lord nineteen hundred and two"—ten months in the future. This code is composed chiefly of old laws carried

forward, but section 841 thereof is entirely new and original legislation. This section is the sole predicate of the instant case, and reads as follows:

> "Sec. 841. EXECUTORS AND OTHER FIDUCIARIES.—Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office of employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

The present case relates exclusively to persons and property that had come into possession long before the code was passed or even contemplated; and as to them we contend that the law has no application whatever, because it includes only those that may come into possession in the future—coming property; but nevertheless the judges below hold (R. 77, 78):

> "The fact which may be inferred from the indictment is made certain by the evidence, namely, that the money came into the possession of the receivers prior to the enactment of the code. * * * We are of the opinion that the learned trial justice did not err in holding that Section 841 comprehends property that may have passed into the defendant's possession as receiver before the time that it went into effect."

On April 3, 1905, this indictment (R. 1-2) was filed. It was based upon the said section 841, and contained eight

courts, differing only as to ownership. A demurrer (R. 2) was filed on April 20, 1905, and was sustained (R. 4) on April 28, 1905, as to four counts, and overruled as to the others. On April 25, 1905, a severance (R. 4) was had, and on May 8, 1905, the plaintiff in error was summarily put to trial on the remaining four counts. He was convicted on the third count, and acquitted on the others.

We are, therefore, concerned with the third count alone, which reads as follows:

> "THIRD COUNT:
>
> "And the grand jurors aforesaid, upon their oath aforesaid, do further present:
>
> "That on the twenty-third day of November, in the year of our Lord, one thousand, nine hundred and three, and at the District aforesaid, said Andrew A. Lipscomb and said Thomas M. Fields were receivers, that is to say, were receivers under a certain order of the Supreme Court of the District of Columbia, holding an equity court, dated the sixth day of November, in the year of our Lord, one thousand eight hundred and ninety-four, in equity cause number fifteen thousand, nine hundred and seven, and entitled the Washington Beneficial Endowment Association versus the Commercial Alliance Life Insurance Company; that on the said twenty-third day of November, in the year of our Lord, one thousand nine hundred and three, the said Andrew A. Lipscomb and said Thomas M. Fields, as such receivers, had possession of a certain other large sum of money, to-wit, the sum of fifteen thousand, nine hundred and seventy-four dollars and seven cents, which said fifteen thousand, nine hundred and seventy-four dollars and seven cents, in money of the value of fifteen thousand, nine hundred and seventy-four dollars and seven cents, being the property and moneys of the Washington Beneficial Endowment Association, a body corporate, had then and there come into such possession of them, the said Andrew A. Lipscomb and said Thomas M. Fields, by virtue of their office and employment as such receiv-

ers, and that they, the said Andrew A. Lipscomb and said Thomas M. Fields, so having the said fifteen thousand, nine hundred and seventy-four dollars and seven cents in their possession as aforesaid on the said twenty-third day of November in the year last aforesaid, and at the District aforesaid, and while they were such receivers as aforesaid, did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby then and there embezzle the same; against the form of the statute in such case made and provided, and against the peace and Government of the said United States."

The demurrer (R. 2-4) assails this count on various grounds, among which are that it is bad in substance in that no offense is charged under said section 841 or any other law; no description is given of the property or any property of which the accused are alleged to have been appointed receivers, nor are any facts alleged showing any connection between the money alleged to have been received by them and the receivership order recited, or that the money was included in the order; the facts and particulars of the receivership are not alleged; there is no direct allegation of ownership; no facts or particulars are alleged showing that the accused have converted or appropriated the money to their own use, but only a mere conclusion to that effect; no facts or particulars are stated showing any fraud of the accused, but only a conclusion to that effect from non-averred facts; neither section 841 nor any other law applies to receivers into whose possession the property or money had come before the code took effect; construed and applied retrospectively to include persons and property that had come into possession before the code took effect on January 1, 1902, section 841 is unconstitutional and void by reason of its forfeiture clause, in that it operates a deprivation of property in previously earned, allowed and adjusted commissions, costs, and charges, without due process of law, it takes private property for public or private use without just

or any compensation, and it arbitrarily divests and confiscates vested property rights. The motion in arrest (R. 19) reiterates these objections and adds some others.

Our objection to the application of section 841 to the instant case was frequently repeated and overruled throughout the trial, and we excepted. We contend that the demurrer to this third count should have been sustained, for the reason stated therein.

On Wednesday, May 3, 1905, under the provisions of the said code, we filed our motion and affidavit (R. 5-6) for a commission to take the depositions of two non-resident witnesses in New York, and for letters rogatory to take the deposition of a non-resident witness in London, England, and gave one day's notice (R. 6) of the hearing of this motion, which, on Thursday, May 4, 1905, was granted (R. 7). Our interrogatories were duly prepared, served, and filed before twelve o'clock noon of Saturday, May 6, 1905 (R. 11), but nevertheless the same judge who passed the order forced us into trial (R. 29) on Monday morning, May 8, 1905, over our earnest protests and pleadings for a little time to execute the order and prepare for trial.

On Thursday, May 4, 1905, we filed our motion and affidavit (R. 9) for an order requiring the district attorney to return to the office of the clerk of the trial court all of the original papers and records in the equity cause 15907, mentioned in the indictment (R. 2), which papers and records he had unlawfully removed from the said office some time before the said indictment was found. Inspection of these public papers by us was a matter of fixed right, and absolutely necessary to enable us to prepare for trial. We noted this motion for hearing on Monday, May 8, 1905, when it was heard and overruled, and we excepted. (R. 17, 28, Ex. 1.)

On Thursday, May 4, 1905, we also filed our motion and affidavit (R. 7-8) for a bill of particulars, and on the same date served a copy of each on the district attorney (R. 8), together

with a notice (R. 8) of hearing on Monday, May 8, 1905, on which date he objected for want of two clear days' notice, and this objection was then sustained, and we excepted (R. 29, Ex. 2), and our motion was thereupon overruled (R. 17).

On Monday, May 8, 1905, we filed our motion and three affidavits (R. 10-16) asking a continuance for a reasonable time, based upon the various reasons therein set forth; but on the same date our motion was overruled and we excepted (R. 17, 29, Ex. 3). We specially called the court's attention (R. 29, Ex. 4) to the order for the commission and letters rogatory, and begged for the short time necessary to execute the same. Our affidavits showed beyond any question that both the accused and his counsel were utterly helpless without a reasonable continuance, but it was refused instantly and in a single word.

The accused was then arraigned (R. 29, 17-18), and pleaded not guilty to the said four counts, and the alleged trial began immediately, and continued as a practically *ex parte* proceeding to its close, as the accused was confronted with the obvious predetermination to railroad him to conviction at any cost, and to give him no chance whatever to defend himself. It was impossible (*Gassenheimer vs. United States,* 24 App. D. C. 312, 313) for the accused to compel the removal of the case for trial before another judge.

We contend that each of the foregoing motions should have been granted, and that the denial is subject to review.

We further contend that the effect of the plea on the pleading and proof was ignored, and that the evidence offered to show the alleged receivership, possession, ownership (including corporate existence), and conversion was inadmissible; and that even if admissible, it was insufficient in law to support the verdict. These questions are raised by various objections and exceptions reserved during the trial.

In connection with the foregoing questions concerning the evidence, we also rely upon various exceptions to errors com-

mitted in the granting of certain prayers and the refusing of others, and in the general charge to the jury.

We also assert that the trial judge, in the presence of the jury, indulged in certain caustic comments which were erroneous, unwarranted, improper, and intensely prejudicial to the accused, in that, among other things, they declared his guilt and certain conviction, and destroyed the effect of his granted prayers, and otherwise seriously and unjustly reflected upon both the accused and his counsel; to which comments we duly excepted.

We further contend that in the absence of any testimony concerning his character, a legal presumption of good character existed in favor of the accused, and that his request for an instruction to the jury on this subject should have been granted; but it was refused and exception was duly noted.

We also insist that the then district attorney and his then assistant committed repeated and flagrant breaches of their professional and official duties in their arguments to the jury, and in certain statements made to the court in the presence of the panel of jurors; to which misconduct we duly reserved exceptions.

Before and during the alleged trial, but always in the presence of the panel of jurors and with the approval of the trial judge, the then prosecutors falsely and deliberately charged the accused with various crimes and offenses and odious acts other than that alleged in this indictment; and under this pleading averring the conversion of one certain sum of money on one certain date, they were permitted, without any statute so providing, to present in evidence (R. 38-41) no less than ninety-two separate and distinct acts, items or transactions, without any election whatever, each claimed to be in itself a substantive offense of embezzlement, forty-three of which preceded the code and the statute of limitations, sixty-one of which were private checks which were not money, and sixteen of which were private certificates of deposit which

were not money; all of which ninety-two items the trial court sent to the jury with the charge (R. 69-70) that they would be justified in finding the accused guilty of all of them if they should find (from no evidence whatever) that he had conceived a plan to embezzle the fund systematically, but if they should not find such a plan, then they should select some single item and convict of that, taking into consideration, however, on the question of intent, all of the other items. The presumed plan seems to have been the *corpus delicti;* but the case was so conducted—or, rather, misconducted—that it is utterly impossible to designate the real *corpus delicti*—if any there were—or to tell of what the accused has been convicted.

We contend also that the bill of exceptions is complete and conclusive, and must be taken so to be, and to contain the substance of all of the evidence offered by the prosecution, notwithstanding there is no affirmative recital to that effect.

Throughout the bill appear the initials "D. T. W.," being those of the trial judge, made by him to designate the changes which he effected after the bill had been formally agreed on by the respective parties and submitted to him for his signature. These changes relate chiefly to his own rulings, and in some instances render the bill contradictory in its recitals, in others greatly confuse it, and in still others destroy the exceptions noted by leaving the objections without any of the reasons upon which they were based.

We claim, further, that the judgment is bad on its face.

For a more complete and detailed statement of the case and the various questions presented by the record, we respectfully refer to our petition for the writ of *certiorari,* which we have already mentioned. These questions are fully discussed in our brief on the merits, in which we try to show that in this case neither of the courts below is impeccable, but each constantly impinges on the Constitution, the acts of Congress, and the elementary rules of law, language and logic, in order to convict and destroy the accused. The maxim, "*Ignorantia*

juris quod quisque scire tenetur, neminem excusat," applies to the judge and prosecutor as much as to the accused. *Ignorantia judicis est calamitas innocentis.*

We shall pretermit, in the oral argument, various errors assigned, leaving their discussion to our briefs, but without in any manner waiving the benefit of them.

At this point we shall take the liberty to note that although certain orders and decrees in the equity cause 15907, referred to in the indictment, were vital to the prosecution's case, yet no evidence whatever was offered to show that the chancery court had ever acquired jurisdiction in any way over the Commercial Alliance Life Insurance Company, the sole defendant to that suit; and since that record affirmatively showed that the said Company was a non-resident corporation, without an office or agent in this District, and the said suit, orders and decrees were *in personam* and not *in rem*, the presumption of law was and is against jurisdiction of the corporation in such a case. (Record 30, Bill in Eq. 15907. Record 35, Report of Auditor. Record 44-45, Deed.) To enable the prosecution to avail itself of the said orders and decrees, affirmative proof of jurisdiction over the Company was essential. *Galpin vs. Page*, 18 Wall. 350, 366. Even if such jurisdiction had been shown, another difficulty appears in that the record recites (R. 53, bottom) that "all of the orders and decrees passed in said Equity Cause No. 15907, and consolidated causes, were recorded finally and at length in the minutes of the court the same day they were passed"; yet in no instance was the judicial record or minutes offered to prove any of them, but the prosecution merely produced a witness, who was a file clerk in the trial court (R. 30), to whom certain papers were shown, which he identified as found in a box in the district attorney's office; but he did not testify that they were in fact either genuine or original papers, nor was there any proof that they were such. The witness, in every instance, merely stated what the various papers shown to and identified by him purported to be. The

mere production of a paper "purporting" to be this or that, did not prove it to be either original or genuine. No foundation whatever was laid for secondary evidence of the said orders and decrees. The judicial record was at hand, and by it alone could they be proved, for the original papers were not the legal evidence to establish what the record contained. 17 *Cyc.* 303. 24 *Am. & Eng. Encyc. Law* 200. *Duncan vs. Freeman,* 109 Ala. 185, 189. 24 *Am & Eng. Encyc. Law* 190. Exceptions were duly reserved to all of the alleged orders and decrees which were put in evidence, but it will probably be claimed by the opposing counsel that this particular ground was not stated in our objections. The want of proof of the jurisdiction of the chancery court is clearly open on review, and our prayers for a verdict on all of the evidence in the case search the whole record for any omission to prove any essential fact by legal evidence thereof.

ASSIGNMENT OF ERRORS.

The court of appeals of the District of Columbia erred in the following respects:

I. Trial Court Had No Jurisdiction.

The court erred in holding (R. 77-78) that the trial court had jurisdiction of this case upon the false theory that section 841 of the code of law of the District of Columbia—

> "comprehends property that may have passed into the defendant's possession as receiver before the time that it went into effect." (Brief, pp. 1-64. Record 2-4, Demurrer. R. 19, Motion in Arrest. Record 59, Exception 34, Motion for Verdict. R. 59, Ex. 38, Prayer VI. R. 31-32, Ex. 5. R. 32, Exs. 6-9. R. 34, Ex. 10. R. 34-35, Ex. 11. R. 38, Ex. 11A. R. 40, Ex. 13. R. 41, Ex. 14.)

II. Commission and Letters Rogatory.

The court erred in holding (R. 78-80) that the accused was not entitled to any time whatever to execute the order (R. 7) for the commission and letters rogatory, the said order having been passed on Thursday, May 4, 1905, and the trial having been held on Monday, May 8, 1905. (Brief, pp. 64-71.)

III. Inspection of Papers in Eq. 15907.

The court erred in holding (R. 78) that the accused was not entitled to an order for inspection of public papers requiring the prosecutor to return to the office of the clerk of the trial court all of the original papers and records in Equity Cause No. 15907, mentioned (R. 2) in the indictment, which papers and records he had unlawfully removed therefrom some time prior to the filing of the indictment; inasmuch as (1) their free inspection was absolutely necessary to enable the accused and his counsel to prepare for trial, and (2) the trial court of its own motion ruled (R. 42, top) that—

> "it is against public policy to remove public records from their place of lawful custody, for the purpose of using them as evidence." (Brief, pp. 71-75.)

IV. Bill of Particulars.

The court erred in holding (R. 77) that the accused was not entitled to a bill of particulars. (Brief, pp. 76-83.)

V. Continuance.

The court erred in holding (R. 78-80) that the accused was not entitled to a continuance in order that he and his counsel might have the time absolutely necessary to enable them to prepare for trial. (Brief, pp. 83-92.)

VI. Effect of Plea.

The court erred in ignoring the effect of the accused's plea on the pleading and proof. (Brief, pp. 93, 97.)

VII. The Receivership.

The court also erred in holding—

(*a*) That (R. 76) the allegations of the indictment (R. 1-2) as to the receivership are sufficient. (Brief, pp. 93-95. R. 3, Demurrer. R. 19, Motion in Arrest.)

(*b*) That (R. 80, 81, 82) the evidence is sufficient to show that the accused was a receiver as alleged. (Brief, pp. 95-99. R. 21, Motion, paragraphs 8 and 9. R. 31-32, Ex. 5, Receivership Order. R. 59, Ex. 35, Pr. I. R. 59, Ex. 36, Pr. IV.)

(*c*) That (R. 80, 81, 82) the several reports of the accused in equity cause 15907 were competent evidence as admissions to prove the alleged receivership. (Brief, p. 174. *See Error X (t) infra.*)

(*d*) That (R. 80, 81, 82) there was no error of the trial court in peremptorily charging the jury (R. 66, bottom) as follows:

> "You may take it as a matter settled by the proceedings of that court that the defendant was a receiver as charged in this indictment." (Brief, pp. 97-99, 174. R. 59, Ex. 35, Pr. I. R. 59, Ex. 36, Pr. IV. R. 31-32, Ex. 5, Receivership Order. R. 21, Motion, paragraphs 8 and 9. *See Error X (t) infra.*)

VIII. The Possession.

The court also erred in holding—

(*a*) That (R. 76) the allegations of the indictment (R. 2) as to the possession as "such receivers," are suffi-

cient. (Brief, pp. 99-100. R. 3, Demurrer. R. 19, Motion in Arrest.)

(*b*) That (R. 80, 81, 82) the evidence is sufficient to show possession as "such receivers" as alleged. (Brief, pp. 100, 174. *See Error X* (*t*) *infra.* R. 59, Ex. 35, Pr. I. R. 59, Ex. 36, Pr. IV. R. 21, Motion, paragraphs 8 and 9.)

IX. The Ownership.

The court also erred in holding—

(*a*) That (R. 76) the allegations of the indictment (R. 2) as to the ownership are sufficient. (Brief, pp. 100-101.)

(*b*) That (R. 80) the evidence is sufficient to prove the ownership as alleged. (Brief, pp. 101-117.)

(*c*) That (R. 80) the accused was not a joint owner of the fund. (Brief, pp. 100, 114.)

(*d*) That (R. 80) there was no error of the trial court in overruling (R. 59, Ex. 34) the accused's motion for a verdict of not guilty on all of the evidence in the case—

> "because the evidence fails to show ownership as alleged in * * * the indictment, either at the time alleged therein, or at any time within three years next before the filing thereof." (Brief, pp. 114, 130.)

(*e*) That (R. 80-81) the evidence is sufficient to show that the alleged owner was "*a body corporate,*" as averred (R. 2) in the indictment. (Brief. pp. 117-133.)

(*f*) That (R. 80) there was no error of the trial court in admitting (R. 42, Ex. 15) in evidence Liber No. 1, Acts of Incorporation; inasmuch as (1) it was wholly irrelevant to any issue in the case, and (2) the trial court had just ruled (R. 42, top) a like record inadmissible. (Brief, p. 130.)

(*g*) That (R. 80) there was no error of the trial court in receiving (R. 42, Ex. 16) the testimony of the witness Schayer. (Brief, p. 121.)

(*h*) That (R. 80) there was no error of the trial court in permitting (R. 44, Ex. 17) the witness Donaldson to testify as to "when the said Association was incorporated"; inasmuch as parol testimony was inadmissible to prove that fact. (Brief, p. 119.)

(*i*) That (R. 80) there was no error of the trial court in admitting (R. 43, Ex. 16) as secondary evidence Liber No. 2, Acts of Incorporation, to prove the alleged certificate of incorporation of the said Association; inasmuch as (1) it was ruled (R. 42) inadmissible as primary evidence, (2) no foundation whatever was laid (R. 42-43) for its introduction as secondary evidence, and (3) the trial court had just sustained (R. 42, top) an objection to and had ruled out *this very record* on the ground (stated by the trial judge himself) that—

> "it is against public policy to remove public records from their place of lawful custody, for the purpose of using them as evidence." (Brief, pp. 120-123.)

(*j*) That (R. 80) there was no error of the trial court in overruling (R. 54, Ex. 28) the accused's motion to strike out all of the secondary evidence tending to prove the alleged certificate of incorporation. (Brief, pp. 120-123.)

(*k*) That (R. 80) there was no error of the trial court in charging the jury (R. 67-68) as follows:

> "Inasmuch as corporations are only created through the manner provided by the law, which involves the issuance of a certain certificate or charter which determines their existence, *if that or a copy of it can be produced*, that is sufficient to determine the question of the existence of such corporate body at that time.
>
> "There is evidence before you which tends to show

that at a certain time a certificate, according to the requirements of the law, was filed in the Recorder's office, but that it has been destroyed. If you find from all the evidence which has been submitted upon that point, including testimony concerning the identification of the record which was read, that *a paper of which that record is a copy was filed* in the Recorder's office at the time indicated by that record, then that would justify you in assuming that the corporation has been duly organized and created. If you are not satisfied beyond a reasonable doubt from the evidence that such a paper was filed, you may inquire whether or not as a matter of fact in the commercial world an organization of this name was representing itself as a corporation, and as such was doing business under the management of such officers as are required in corporate enterprises, that is to say, a president, the secretary, and the like; and if you find from the evidence beyond a reasonable doubt upon that point, that is that the Association was doing business in this District as a corporation and representing itself to be a corporation, *that is sufficient* to justify you in finding for the purposes of this inquiry that it was a corporation.

"If you find that it was a corporation, * * * that the corporation ever was in existence, * * * then it is utterly immaterial whether that corporation was continuing to do business, or continuing to exercise the function of a corporation, *so long as it never was formally dissolved by judicial proceedings,* concerning which there is no proof." (Brief, pp. 117-133, 99. This part of the charge is covered by Exception 34, Record 59. R. 42, Ex. 15. R. 43, Ex. 16. R. 44, Ex. 17. R. 54, Ex. 28. R. 59, Ex. 35, Pr. I. R. 59, Ex. 36, Pr. IV.)

(l) That (R. 80-81) there was no error of the trial court in refusing (R. 62, Pr. XVII, Ex. 40) the following prayer:

"The jury are instructed that the law presumes the defendant to be innocent of the charge against him,

and that this presumption continues all through the case and until and unless he be proved guilty beyond a reasonable doubt. This presumption of innocence is stronger than and overcomes any presumption of the continuance of the life or existence of any person or corporation named in the indictment, and also any presumption of the continuance of the ownership of the moneys mentioned in the indictment, even if they may believe that at some time prior to the alleged offense, some certain person or corporation named in the indictment was in existence and was then the owner of such moneys." (Brief, p. 130.)

X. The Conversion.

The court also erred in holding—

(*a*) That (R. 76-77) the general allegations of the indictment (R. 2) as to the supposed fraudulent conversion are sufficient, and that it is unnecessary to aver any facts or particulars thereof. (Brief, pp. 133-148.)

(*b*) That (R. 76-77) it is not—

"necessary to allege the particular manner in which the defendant unlawfully and fraudulently converted the money and appropriated the same to his own use. These words have a well known signification, common as well as legal, and are of common use in indictments for larceny and embezzlement." (Brief, pp. 133-147, 148.)

(*c*) That (R. 76-77) there was no error of the trial court in charging the jury (R. 68) as follows:

"With respect to the meaning of the phraseology 'convert or appropriate the same to his own use,' it is plain enough. It needs no further definition." (Brief, pp. 133-139, 148. R. 3, Demurrer, par. *g*.)

(*d*) That (R. 82-83) the supposed evidence of the al-

leged fraudulent conversion is "sufficient to support the verdict." (Brief, pp. 149-178.)

(*e*) That (R. 82-83) from the facts related (R. 54-55) by the accused's own witness Mead concerning the delivery of a single item of $1,000 by the accused to Lipscomb, "there being no single circumstance to show that it [such delivery] was a mere irregularity without intent to do wrong, the jury might well have considered the act, to that extent, not only a wrongful, *but also a fraudulent conversion of so much of the fund*"; inasmuch as (1) the trial court ruled (R. 56) in the jury's presence that Mead's testimony showed "*an absolute defense to that item,*" (2) the burden of proof was not lawfully upon the accused, (3) the facts related did not show a wrongful or fraudulent or any conversion to his own use of that sum, and (4) there was no proof of any improper purpose or of any purpose for which the accused delivered the $1,000 to Lipscomb. (Brief, pp. 175-176, 163, 157, 90-91, 92.)

(*f*) That (R. 82-83) there was no error of the trial court in refusing (R. 63, Ex. 45, Pr. XXVII) to instruct the jury as follows:

> "If the jury believes from the evidence that any parts of the sum of money mentioned in the indictment were delivered by the defendant Fields to his co-receiver Lipscomb, then they are instructed, as matter of law, that as to that money so delivered the defendant Fields is not guilty of embezzlement." (Brief, pp. 157, 158, 175, 90-91, 92. R. 54-56, where the trial court ruled (R. 56) the principle of this prayer "*an absolute defense.*")

(*g*) That (R. 82) the evidence shows that the money "was withdrawn through a series of checks cashed at the counter generally by defendant"; inasmuch as the evidence (R. 39) shows that no checks whatever were cashed at the counter or elsewhere by the accused, with but one (R. 54) exception. (Brief, pp. 150-153, 154-155, 176.)

(*h*) That (R. 82) the evidence shows that "when the final order of the tribunal was made there was nothing paid to the parties declared entitled to the same"; inasmuch as the evidence (R. 53, Testimony of Robinson and Padgett) does not so show. (Brief, pp. 153, 156, 162-163, 102, 114, 116, 132.)

(*i*) That (R. 82) the evidence shows that the money was withdrawn from the Trust Co. and "was removed into other banks without an order to that effect, and deposited in the names of the two receivers as individuals"; inasmuch as there is no such evidence in the record. (Brief, pp. 150-153, 176.)

(*j*) That (R. 82) there was no error of the trial court in receiving (R. 38-41) in evidence *without election no less than ninety-two separate and distinct items, acts, or transactions, each as in itself a substantive offense* of embezzlement, and overruling (R. 41, Ex. 14) the accused's objection to such evidence—

> "because the indictment alleges but one offense, and the Government should not be permitted to prove any number of alleged acts of embezzlement under an indictment which alleges the embezzlement of a lump sum on a particular day." (Brief, pp. 149, 165-173, 80-82. Record 21, Motion, par. 10.)

(*k*) That (R. 82) there was no error of the trial court in charging the jury (R. 69-70) as follows:

> "Inasmuch as the evidence has dealt with more than a single transaction, in the way of drawing checks and the like, [each of] which the Government claims in itself was an embezzlement, I will point out to you the considerations which ought to guide your deliberations in dealing with those various items.
>
> "If you find from the evidence that after January 1st, 1902, the defendant conceived *a plan* to embezzle this fund systematically, and he did embezzle it at different times in accordance with that preconceived

plan, then *you would be justified in finding him guilty concerning all the embezzlements that you find the proof makes out;* but if you find there was not such a plan preconceived by him before the first embezzlement, and conclude from the evidence that each conversion by him * * * was in itself distinct from every other * * * then you would only be justified in that state of affairs *in finding him guilty upon one single conversion, concerning which all of you must agree.*" (Brief, pp. 149, 172, 173, 165-171, 80-81. This part of the charge is covered by Exception 14, Record 41. Brief, pp. 166, 99. Record 21, Motion, par. 10. The error is also fundamental, and hence requires no exception. Brief, p. 98. *Thornley vs. State,* 36 Tex. Cr. Rep. 119, 124. *Edelhoff vs. State,* 5 Wyo. 19, 27, 28. *Martin vs. State,* 36 Tex. Cr. Rep. 125, 127.)

(*l*) That (R. 82) there was no error of the trial court in refusing (R. 41, Ex. 14. R. 58, Ex. 32. R. 69-70) to require the Government to prove that the accused had fraudulently converted *some particular sum* to his own use. (Brief, pp. 164-165, 80-81, 165-173. R. 21, Motion, par. 10. R. 22, Motion, par. 11.)

(*m*) That (R. 82) there was no error of the trial court in granting (R. 58, Ex. 32) the following prayer:

"The jury are instructed as a matter of law that the Government is not required to prove that the exact sum of money mentioned in the indictment was fraudulently converted or appropriated by the defendant to his own use or that such fraudulent conversion or appropriation occurred at the exact date mentioned in the indictment; it is sufficient if *any part* of such sum was so fraudulently appropriated or converted at any time within three years next before the filing of the indictment." (Brief, pp. 149, 157, 165-173, 80-81.)

(*n*) That (R. 82) there was no error of the trial court in admitting (R. 38-39, 40, Ex. 13) in evidence as separate

and substantive offenses, and without election, sixty-one private checks and sixteen time certificates of deposit as proof of the alleged embezzlement of money (*sic*) averred (R. 2) in the indictment. (Brief, p. 164. R. 22, Motion, par. 12.)

(*o*) That (R. 82) there was no error of the trial court in admitting (R. 38-39, 40, Ex. 13) in evidence, as separate and substantive offenses, and without election, fourteen time certificates of deposit and seventeen checks and twelve withdrawals which preceded (R. 39) both the code and the statute of limitations. (Brief, pp. 177, 82. R. 22, Motion, par. 13 *ad finem.*)

(*p*) That (R. 82) there was no error of the trial court in admitting (R. 39, Ex. 12. R. 40, Ex. 13) in evidence the several deposit slips relating to the accused's accounts in the Trust Company; inasmuch as the Government (R. 39) proved each of said slips "to be in the handwriting of some certain clerk in said Trust Company," and there was no evidence to show that the accused either authorized them or knew anything about them. (Brief, p. 165.)

(*q*) That (R. 82) the evidence shows that "pending inquiry the defendant absconded"; inasmuch as there is no evidence so showing. (Brief, pp. 153, 156, 157-161.)

(*r*) That (R. 82) there was no error of the trial court in granting the following prayer:

> "As bearing upon the question of the defendant's guilt or innocence, the jury may and should consider the evidence in the case which tends to prove that the defendant was a fugitive from justice, and if it finds from the evidence that he did flee from justice that fact, if found to be a fact, while not conclusive evidence of guilt, may, unless explained by something in the testimony, or other facts of the case, be accepted by the jury as circumstances, tending to prove that he regarded himself as guilty." (Brief, pp. 157-158. R. 57-58, Ex. 31.)

(*s*) That (R. 82) there was no error of the trial court in refusing the following prayer:

> "The jury are instructed that the mere fact that the defendant was absent from the District of Columbia when arrested, does not raise any presumption of itself, even though unexplained, that such absence was on account of the charge in this case; and further, that even if they fully believe that such absence was on account of such charge, it does not of itself create any presumption whatever of the defendant's guilt." (Brief, p. 158. R. 63, Ex. 43, Pr. XXII.)

(*t*) That (R. 80, 81, 82) there was no error of the trial court in admitting (R. 32, Ex. 7. R. 34, Ex. 10. R. 34-35, Ex. 11. R. 49-50, Ex. 28. R. 51-52) in evidence in this cause the pleadings of the accused as a party, and the discovery and evidence obtained from him as a party and a witness, in the judicial proceedings known as Equity Causes Nos. 15907 and 16072; inasmuch as the same are inadmissible under the general rules of evidence, and especially as *section 860 R. S. U. S.* destroys the power and jurisdiction of the court to allow the same "to be given in evidence, or in any manner used against him or his property or estate, in any court of the United States in any criminal proceeding, or for the enforcement of any penalty or forfeiture," and makes it essential for the Government to prove its case otherwise, and the same are not made competent evidence by the mere failure of the accused to object specifically on the ground of the provisions of said *section 860 R. S. U. S.*, but even if so, this court may consider the same as plain errors. (Brief, pp. 174, 98-99.)

XI. Improper Comments of Trial Judge.

The court also erred in holding (R. 81-82) that there was no error of the trial court in making the following comments and rulings (R. 57, 58-59, Ex. 33) in the presence of the jury:

"Thereupon the Government and the defendant handed up their respective prayers for instructions, the defendant's counsel stating to the court that the determination of what of his prayers would be offered would depend on the court's ruling on others, as the court would see from the drafts of the prayers handed up. The court then took a recess. After recess the following occurred: *The Court:* Mr. Stenographer, you may note that a series of 27 special prayers were submitted to the court, fastened together by counsel for the defendant. The court has examined them sufficiently to ascertain that some are improper statements of law without taking the entire series into view, and they are refused. *Mr. Baker:* We note an exception to the refusal of each prayer. We note an exception separately to the refusal of each prayer offered. I wish your Honor to understand that we do not offer the prayers as a series. We offer each one separately, and ask your Honor's ruling on each prayer. *The Court:* I overrule them. They are put together as a series, and as a series are refused. *Mr. Baker:* Then I offer Prayer No. 1. But I suppose the Government should offer their prayers first. I would like to have an exception to the court's refusal to consider the prayers.

"Thereupon the said prayers were handed to the clerk, and filed in open court, endorsed by the court as follows: 'This series of instructions is refused as a series and ex. *Wright.*'

* * * * * * * *

"Thereupon the following occurred:

"*The Court:* I should perhaps make it clear right here and now, that it is a question which ought to be settled whether it is appropriate in this jurisdiction for counsel to submit a series of all the way from 27 instructions up to an indefinite number. Some 27 prayers have been submitted here *in a series, and in a manner that indicates that the purpose of the request is not to ascertain the opinion of this court on the law in respect to this trial, but to save some possible point for reversal in another court.* I started

to examine these prayers during the recess, and the time afforded did not suffice for the examination of a fifth of them. For me to examine this series of prayers in detail would require the postponing of this trial over two or three days. As before said, they are offered in a series, and as a series they are refused, because some of them are improper statements of law. *Mr. Baker:* If your Honor please, I will state that the prayers are not offered in a series. They are not offered for the purpose of having—— *The Court:* You will not state that, either. What I say controls that. *Mr. Baker:* Then I note an exception to the court's ruling, and I ask to offer these prayers separately. *The Court:* I will not permit them to be offered separately in the form in which they are. *Mr. Baker:* Then I note an exception to the ruling of the court." (Brief, pp. 178-182. See also R. 29, and Brief, pp. 75-76, as to the unwarranted insinuations of the trial judge against the accused and his counsel concerning the loss of papers from the court files.)

XII. Good Character.

The court also erred in holding (R. 83)—

(*a*) That there was no error of the trial court in refusing the following prayer:

> "The jury are instructed in this case that the law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in their consideration of the evidence." (Brief, pp. 182-190. R. 63, Ex. 44, Pr. XXV.)

(*b*) That the accused was not entitled to any instruction whatever on the subject of the presumption of his good character, because he "offered no evidence of good character." (Brief, pp. 182-190.)

XIII. Misconduct of Prosecutors.

The court also erred in holding (R. 83-84) that there was no error of the trial court in permitting the prosecutors, in their baseless arguments to the jury,—

(*a*) To charge the accused with (1) being "a common thief," (2) depositing these trust funds to his private bank account, (3) "forgery," (4) "treating people as a physician," (5) "trying to break into" the medical profession, (6) maltreating his clients as a lawyer, (7) stealing dead men's money from widows and wards, (8) posing under an assumed name, (9) being a fugitive from justice, (10) not even trying "to prove a good reputation," (11) being a lawyer, and (12)—

> "You have seen, gentlemen, how the case has been fought. Counsel have day after day stood in this court like phonographs, the passive mouthpieces of the defendant, who has conducted his own defense." (Brief, pp. 190-201. R. 63-65, Exs. 47, 48, 49, 51, 52, 54. R. 21, Motion, par. 7.)

(*b*) To show to the jury and have them examine the ruled out (R. 41, top) endorsements on the checks on account No. 35191, and to comment thereon. (Brief, pp. 191 (top), 196-197. R. 64, Ex. 50. See also R. 17, 28, 78, and Brief, pp. 74-75, as to the prosecutor's false insinuations against the accused and his counsel respecting the loss of papers from the court files.)

XIV. Bill of Exceptions.

The court also erred in holding (R. 82) that the bill of exceptions (R. 28-71) can not be taken to contain the substance of all of the evidence offered by the Government, in the absence of an affirmative recital to that effect. (Brief, pp. 201-207.)

XV. The Judgment.

The court also erred in holding (R. 84-85) valid the alleged judgment (R. 26-27), either before or after (R. 85) its modification. (Brief, pp. 207-208.)

XVI. Conclusion.

The court also erred in holding that there was no error of the trial court—

(*a*) In refusing (R. 62, Ex. 42, Pr. XX) the following prayer:

> "The jury are instructed that upon the evidence in this case they *may* find the defendant not guilty on the two [third and sixth] counts of the indictment, and they *must* find him not guilty on at least one of the counts." (Brief, pp. 180, 181.)

(*b*) In refusing (R. 59, Ex. 35, Pr. I) the following prayer:

> "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty." (Brief, pp. 97, 114, 130, 173.)

(*c*) In refusing (R. 59, Ex. 36, Pr. IV) the following prayer:

> "The jury are instructed as matter of law, upon all the evidence in the case, to return a verdict of not guilty as to the third count of the indictment." (Brief, pp. 97, 107, 114, 130, 173.)

(*d*) The court also erred in assuming as facts certain material matters not in this record nor in existence, and certain others in direct conflict with the record, and in ignoring and misconceiving and misreciting certain facts shown by the record, especially in those parts of its opin-

ion relating to inspection of papers, continuance, ownership, corporate existence, conversion and arguments of the prosecutors.

(*e*) The court also erred in ignoring many of the exceptions reserved and errors assigned, and in deciding this case without regard to the theories of the prosecutors and the trial judge, and the rulings of the trial court on the proof and prayers and in its charge to the jury, but in some respects in direct conflict therewith, especially as to the effect of the annulment decree on ownership, and the effect of the witness Mead's testimony on conversion.

(*f*) The court also erred in affirming the judgment of the supreme court of the District of Columbia; inasmuch as it should have reversed the same.

(*g*) The court also erred in other respects apparent of record.

At this point we shall pass to our aforesaid briefs on the the jurisdiction and merits.

Respectfully submitted.

FRANK J. HOGAN,
JOHN C. GITTINGS,
Attorneys for Plaintiff in Error.

HENRY E. DAVIS,
Counsel.

Washington, D. C., March, 1907.

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No. 395.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,

v.

THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

MOTION TO DISMISS, AND BRIEF IN SUPPORT THEREOF.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 395.

MOTION TO DISMISS, AND BRIEF IN SUPPORT THEREOF.

Comes now the Solicitor-General on behalf of the defendant in error in the above-entitled cause, and moves the court to dismiss the same for want of jurisdiction.

The plaintiff in error, Thomas M. Fields, was indicted in the Supreme Court of the District of Columbia at the January term, 1905, for embezzlement. The defendant demurred to each of the eight counts of the indictment (Rec., p. 2), and the demurrer was sustained as to counts 4, 5, 7, and 8, and was overruled as to counts 1, 2, 3, and 6 (Rec., p. 4).

The defendant then pleaded not guilty, his trial was begun on May 8, 1905, and on May 15 he was convicted under the third count and acquitted under counts 1, 2, and 6. (Rec., p. 18.)

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He moved in arrest of judgment (Rec., p. 19) and for a new trial (Rec., p. 20), and these motions being overruled he was sentenced, on July 28, 1905, to be imprisoned and kept at labor in the penitentiary for five years (Rec., p. 26).

He appealed to the Court of Appeals of the District of Columbia, which modified the judgment of the Supreme Court of the District of Columbia by striking out the words "at labor," and, as so modified, affirmed it. (27 App. D. C., 433; Rec., pp. 75–85.)

Petitions for a rehearing and for the allowance of a writ of error having been denied by the Court of Appeals, this writ of error was sued out.

ARGUMENT.

The right to a writ of error from the Supreme Court of the United States is given in section 233 of the District of Columbia Code (31 Stat. L., 1189, 1227), which reads as follows:

> Any final judgment or decree of the Court of Appeals may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteeen hundred and ninety-three, and also in cases,

> without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States.

The present case does not involve a pecuniary amount sufficient to warrant the writ of error, nor, indeed, any amount; nor does it involve the validity of any patent or copyright; and the validity of no treaty of the United States, nor authority exercised by the United States, is drawn in question. If this writ of error can be supported, it must be under the clause providing for such writ where the validity of a statute of the United States is drawn in question.

The third count of the indictment under which the plaintiff in error was convicted charges that on November 23, 1903, he and another were receivers under an order of the Supreme Court of the District of Columbia entered November 6, 1894, in an equity cause then pending in said court; that on said November 23, 1903, the receivers had possession of $15,974.07 which had come into their possession by virtue of their office and employment as such receivers; and that on said November 23, 1903, they embezzled the same. (Rec., pp. 1, 2.)

The indictment was brought under section 841 of the District of Columbia Code, which is as follows:

> SEC. 841. Executors and other fiduciaries.—Any executor, administrator, guar-

> dian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding ten years, or both. (Effective Jan. 1, 1902.)

The plaintiff in error attempted in the trial court and in the appellate court, and now attempts in this court, to draw in question the validity of the foregoing statute. An examination of the record demonstrates that this question has not been and can not be properly raised in this case.

In his demurrer to the indictment the defendant sets down, among others, the following points:

> *i*. Neither said section 841 of the said Code of Law for the District of Columbia, nor any other law, applies to receivers appointed before January 1, 1902.
>
> *j*. The said section 841 is unconstitutional and void, because the forfeiture clause thereof operates to deprive the citizens of their property without due process of law; it denies them the equal protection of the

> laws; it inflicts cruel and unusual punishment; it takes private property for public or private use without compensation, and divests vested rights, especially so if given any retroactive effect. (Rec., p. 3.)

In his motion in arrest of judgment he again attempts to raise the question.

> 2. Because Code, section 841, is unconstitutional and void in that it attempts to make a receiver or other fiduciary guilty of embezzling his own property by forfeiting all right or claim to any vested commissions, costs, and charges, and declaring him guilty of embezzlement of the entire amount or value of the money or other property coming into his possession. (Rec., p. 19.)

It is to be noted that the words of the statute are "shall be deemed guilty of embezzlement of the entire amount or value of the money or other property *so coming into his possession and converted or appropriated* to his own use."

In his statement of supposed errors, filed in the Court of Appeals, the appellant says:

> The court erred: 1. In holding Code of the District of Columbia, section 841, to be retrospective and applicable to this case. 2. In holding said section so construed and applied to be constitutional.

We have, then, in both courts, two questions attempted to be raised—one as to the *construction* and *application* of the statute, the other as to the *constitutionality* or *validity* of the statute.

Whether the questions raised in this case refer to the construction and application of the statute, or to its constitutionality or validity, this court has no jurisdiction to review on writ of error the judgment of the Court of Appeals of the District of Columbia, because it is a judgment in a criminal case.

This court, in the case of *Chapman* v. *United States* (164 U. S., 436), construing section 8 of the act of February 9, 1893, since reenacted as section 233 of the District Code, above quoted, held that this act conferred no jurisdiction upon this court to review on writ of error a judgment of the Court of Appeals of the District of Columbia in a criminal case, notwithstanding that the validity of the statute under which the case is prosecuted is drawn in question.

The same doctrine has been announced in the case of *Sinclair* v. *District of Columbia* (192 U. S., 16), where this court, construing section 233 of the District Code, and following the Chapman case, dismissed a writ of error on the same ground.

But it may be argued that the judgment in this case under the statute, namely, section 841 of the Code, involves more than the corporal punishment of the plaintiff in error, and that it involves an amount sufficient to give this court jurisdiction.

It will be observed that section 841 of the District Code provides that any receiver or other officer named in the section into whose possession money or other property of another person may

come by virtue of his office or employment, who shall fraudulently convert and appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon. It then provides that he shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so converted or appropriated to his own use, and shall be punished by a fine or by imprisonment, or by both.

The record in this case fails to show that the forfeiture clause of the statute was invoked or attempted to be invoked.

On the contrary, the record affirmatively shows (pp. 34, 35, and 36) that all commissions, costs, and charges, amounting to about $10,000, had been allowed and paid to the receivers long before the finding of the indictment, and that they were charged in the indictment with the embezzlement of the net sum to be distributed by the court after the allowance of all commissions, charges, and costs.

The indictment charges them with the embezzlement of the net sum remaining for distribution, and seeks no forfeiture, but only punishment for embezzlement. (Rec., pp. 1–2.)

The testimony all relates to the conversion of the net sum chargeable against the receivers exclusive of commissions, charges, and costs.

The judgment condemns the defendant to imprisonment for five years, but neither adjudges nor attempts to adjudge any forfeiture of commissions,

costs or charges, either allowed or claimed. (Rec., pp. 26–27.)

As the Court of Appeals has said (Rec., p. 84):

> (1) While section 841 declares a forfeiture of a receiver's commissions and charges in cases of embezzlement of the funds in his possession, it is not a part of the punishment which the court having jurisdiction of the offence is authorized to impose, and it was properly omitted in entering the judgment upon the verdict and fixing the penalty. If effective, the question of the forfeiture is for the determination of the equity court having jurisdiction in the matter of the receivership when the accounts thereof come on for final settlement.

The forfeiture clause is not and never was in issue in this case. The indictment was not aimed at forfeiture; the judgment contains no enforcement of the forfeiture clause of the statute. The statute does not make forfeiture a part of the punishment; the punishment is by fine or imprisonment, or both. The punishment clause and the forfeiture clause are severable.

But it may be argued that the forfeiture is part of the punishment, and should have been included in the judgment; and that the judgment, not including forfeiture, is void.

In the recent case of *Burton* v. *United States* (196 U. S., 283), a case brought under section 1782, Revised Statutes, which provides that persons con-

victed thereunder shall be incapable of holding any office under the United States, there was no inclusion of this forfeiture in the judgment.

The argument that forfeiture should be included in the judgment reduces the question to one of the *construction* and *application* of the statute, and not of its *validity*. So in the last analysis the questions raised by the plaintiff in error all refer to the construction and application of section 841 of the District Code, and not to its constitutionality.

But such questions can not form the basis of a writ of error from the court.

In the case of *South Carolina* v. *Seymour* (153 U. S., 3 3) a motion to dismiss for want of jurisdiction, a writ of error to the Court of Appeals of the District of Columbia was allowed. While that case was decided in 1894, before the passage of the Code of Laws for the District of Columbia, the act by which it was governed was identical with the wording of the present section 233 of the Code. The question in that case related to the validity of an authority exercised under the United States. But the court held—

> In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an authority exercised under the United States, must be directly drawn in question.

See also *United States* v. *Lynch* (137 U. S., 280); *United States ex rel. Taylor* v. *Taft*, just decided.

Therefore the writ of error will not lie in this case, even though it be distinguished from the cases of *Chapman* v. *United States* and *Sinclair* v. *District of Columbia*, cited above.

It is submitted that the motion to dismiss for want of jurisdiction should be granted.

HENRY M. HOYT,
Solicitor-General.

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Office Supreme Court, U. S.
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JAN 21 1907
JAMES H. McKENNEY,
CLERK.

No. 395.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

BRIEF IN OPPOSITION TO PETITION.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES. } No. 395.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

STATEMENT.

The petitioner and plaintiff in error, Thomas M. Fields, was indicted in the Supreme Court of the District of Columbia at the January term, 1905, for embezzlement. The defendant demurred to each of the eight counts of the indictment (Rec., p. 2), and the demurrer was sustained as to counts 4, 5, 7, and 8, and was overruled as to counts 1, 2, 3, and 6 (Rec., p. 4).

The defendant then pleaded not guilty; his trial was begun on May 8, 1905, and on May 15 he was convicted under the third count and acquitted under counts 1, 2, and 6. (Rec., p. 18.)

He moved in arrest of judgment (Rec., p. 19) and for a new trial (Rec., p. 20), and these motions being overruled, he was sentenced, on July 28,

1905, to be imprisoned and kept at labor in the penitentiary for five years. (Rec., p. 26.)

He appealed to the Court of Appeals of the District of Columbia, which modified the judgment of the Supreme Court of the District of Columbia by striking out the words "at labor," and, as so modified, affirmed it. (27 App. D. C., 433; Rec., pp. 75–85.)

Petitions for a rehearing and for the allowance of a writ of error having been denied by the Court of Appeals, a writ of error was sued out from this court, and a motion to dismiss the same is pending.

He has also filed a petition for a writ of certiorari to the Court of Appeals of the District of Columbia. The record of the Court of Appeals has been certified under the writ of error and has been printed and filed.

ARGUMENT.

The power of this court to issue its writ of certiorari to the Court of Appeals of the District of Columbia is found in section 234 of the District of Columbia Code (31 Stat., 1189, 1227), which reads as follows:

> In any case heretofore made final in the court of appeals it shall be competent for the Supreme Court of the United States to require, by certiorari or otherwise, any such case to be certified to said Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to said Supreme Court.

The Court of Appeals of the District of Columbia was created, as were the Circuit Courts of Appeals, for the purpose of relieving this court of the oppressive burden of general litigation.

Forsyth v. *Hammond*, 166 U. S., 506.
In re Woods, 143 U. S., 202.

But in order to secure uniformity of decision, and to obviate any injurious results that might follow if an absolute finality of determination were given to the court of appeals, the right of review by certiorari was reserved to this court.

This court has uniformly held that its power in certiorari is one which should be sparingly exercised, and only when the circumstances of the case satisfy the court that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of the Nation in its internal or external relations, demands such exercise. (*Forsyth* v. *Hammond*, *supra; Lau Ow Bew*, *Petitioner*, 141 U. S., 583, 587; *In re Woods*, *supra; Lau Ow Bew* v. *U. S.*, 144 U. S., 47, 58; *American Construction Co.* v. *Jacksonville Railway Co.*, 148 U. S., 372, 383.)

This court has recently denied petitions for certiorari to the Court of Appeals of the District of Columbia in the following cases:

Benjamin F. McCaully, *Petitioner*, v. *The United States* (contempt of court, sec. 725, R. S., U. S.), 198 U. S., 586; *Albert M. Ray-*

mond, Petitioner, v. *The United States* (Libel, sec. 815, Dist. Code), 200 U. S., 619; *Taylor Knoll, Petitioner* v. *The United States*, 201 U. S., 643; and in numerous civil cases.

Neither the petition not the record in this case presents any new question, or question of general importance. The case was brought under a purely local law, having no application outside the District of Columbia.

The third count of the indictment, under which the petitioner and plaintiff in error was convicted, charges that on November 23, 1903, he and another were receivers under an order of the Supreme Court of the District of Columbia entered November 6, 1894, in an equity cause then pending in said court; that on said November 23, 1903, the receivers had possession of $15,974.07 which had come into their possession by virtue of their office and employment as such receivers; and that on said November 23, 1903, they embezzled the same. (Rec., pp. 1, 2.)

The indictment was brought under section 841 of the District of Columbia Code, which is as follows:

> SEC. 841. Executors and other fiduciaries—Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own

> use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both. (Effective Jan. 1, 1902.)

Petitioner claims that the primary question of controlling importance in the case is whether the trial court had jurisdiction—that is, whether or not the statute (sec. 841, District Code), denouncing embezzlement by a receiver, relates to property coming into the possession of the receiver before but embezzled after its enactment.

The question is one of construction, and the statute—one of purely local application—has been construed by both local courts, the Supreme Court of the District of Columbia and the Court of Appeals of the District of Columbia. It has not been nor can ever be construed by the courts of other jurisdictions; consequently, there is neither the existence nor the possibility of conflict between the inferior Federal courts upon this question of construction.

The question is undoubtedly of great importance to the petitioner, for a different construction would have permitted him to go unwhipped of justice for thefts which were proven with mathematical certainty. But it is not a question of general impor-

tance. Indeed, it is hardly possible that it can arise again, even in the District of Columbia, because of the time which has elapsed since the enactment of the statute.

The Court of Appeals, after a discussion of section 841 and of cognate sections relating to embezzlement, says (Rec., p. 78):

> It is inconceivable that Congress intended to make a distinction in respect of property thereafter embezzled, dependent upon the time when the same shall have come into the possession of the embezzler. There is no possible foundation in law or morals for such a distinction, and unless compelled by an unmistakable expression of such an intention, no court would be justified in adopting a construction that would give it recognition. "Nothing is better settled than that statutes are to receive a sensible construction, such as will effect the legislative intent, and, if possible, so as to avoid or reject an absurd conclusion." (Lau Ow Bew *v.* U. S., 144 U. S., 47, 59.)
>
> With one exception, none of the multitude of cases cited in appellant's brief covers the particular phase of statutory construction here presented. All are distinguishable, and it is unnecessary to consume space by their separate review. The exception referred to is the decision of an inferior court of another jurisdiction unofficially reported.
>
> We are of the opinion that the learned trial justice did not err in holding that sec-

> tion 841 comprehends property that may have passed into the defendant's possession as receiver before the time that it went into effect, when embezzled thereafter.

In the case of *Bolles* v. *Outing Company*, 175 U. S. 262, cited on the petition at page 5, this court said (p. 265):

> The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial. *In both cases it will endeavor to effect substantial justice.* (*United States* v. *Hartwell*, 6 Wall., 385; *United States* v. *Wiltberger*, 5 Wheat., 76, 95; *American Fur Company* v. *United States*, 2 Pet., 358; *United States* v. *Reese*, 92 U. S., 214.)

The petitioner claims that the decision of the Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit upon the question of the right of the defendant to an instruction on good character in the absence of evidence as to character or reputation. The case of *Mullen* v. *United States*, 106 Fed., 892, decided by that court, is cited in support of the doctrine that in a criminal trial in a Federal court, where no testimony has been offered as to the previous

character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed.

But this broad question was not presented to the Court of Appeals in this case, the question being upon a refusal of a specific prayer offered by the defendant in the trial court, which is set out in the record at page 63, and is quoted by the Court of Appeals in its opinion, as follows (Rec., p. 83):

> (4) Among the refused prayers of the defendant is the following: "The law presumes the defendant to be an upright, honest man of integrity and good character, and they are bound to assume him to be such a man in the consideration of the evidence." The defendant offered no evidence of good character. Assuming that he was entitled to demand an instruction that good character is to be presumed, even when no issue is made thereon, the one offered went much farther than that, for it requires in addition that he shall be presumed to be "an upright, honest man of integrity," also, throughout the consideration of the evidence.

Petitioner urges this court to decide a question which has never been in issue.

Statements in the petition concerning the offer of the series of 27 prayers are not supported by the record. Whatever question may have existed as to the refusal of the trial court to pass upon the series of prayers was eliminated by the subsequent presentation and consideration, and the granting or refusing, of each of said prayers separately.

It is further claimed by petitioner and laid down as a question of general importance that the trial court erred in receiving evidence of 92 separate items, each claimed to be in itself a substantive act of embezzlement and received in evidence as such, under the indictment alleging but a single act on one certain date.

The following extract from the general charge of the trial justice (Rec., p. 69) shows that the jury was fully, carefully, and correctly instructed as to its duty in considering this evidence:

> Respecting a point which was touched upon by the district attorney—although this indictment charges the defendant with having embezzled the sum of $15,974, it is not essential that the proof should go so far as to make out that particular sum, and inasmuch as the evidence has dealt with more than a single transaction, in the way of drawing checks and the like, which the Government claims in itself was an embezzlement, I will point out to you the considerations which ought to guide your deliberations in your dealing with those various items:
>
> If you find from the evidence that after January 1, 1902, the defendant conceived a plan to embezzle this fund systematically, and he did embezzle it at different times in accordance with that preconceived plan, then you would be justified in finding him guilty concerning all the embezzlements that you find the proof makes out; but if you find that there was not such a plan pre-

> conceived by him before a first embezzlement, and conclude from the evidence that each conversion by him, if there was a fraudulent conversion by him, was in itself distinct from every other, if there were other fraudulent conversions, then you would only be justified in that state of affairs in finding him guilty upon one single conversion, concerning which all of you must agree. But in determining, in that aspect of the case, the question of his guilt upon a particular conversion, you will be entitled to take into consideration evidence which you find proves other conversions of the same fund; but only as tending to aid you in coming to a conclusion upon the question of intent—if you find he converted an item in question, whether or not you believe that the conversion of that particular item was done with fraudulent intent.

The question raised by petitioner as to whether section 860 R. S., applies to the Supreme Court of the District of Columbia was not raised in the trial court, but was first raised in the Court of Appeals, in petitioner's brief and assignments of error.

Many of the claims in the petition have no foundation in the record.

The statements in the petition that petitioner was "simply railroaded to trial and infamous conviction" (Pet., pp. 1, 2), and that the trial "was actually in progress only eighteen hours, and was practically an *ex parte* trial of the Government's

case" (Pet., p. 12), are not supported by the record, which shows that the indictment was filed April 3, 1905 (Rec., p. 1), a demurrer was filed April 20 (Rec., p. 2), and was partially sustained and partially overruled April 28 (Rec., p. 4); that divers motions were filed by the defendant on May 3, 4, and 8 (Rec., pp. 7, 9, 10); that the trial was commenced on May 8 (Rec., p. 8), and was concluded by verdict of conviction May 15 (Rec., p. 18); that motions for new trial and in arrest of judgment were filed, considered, and overruled (Rec., pp. 19, 20, 26); that sentence was imposed on July 28, 1905 (Rec., pp. 26, 27), and that the defendant called witnesses and offered testimony, but did not testify himself (Rec., pp. 54, 56).

The statement in the petition (p. 8) "that the defendant's counsel handed up twenty-seven separate prayers, each on a separate sheet of paper, lightly held together with a mere temporary slip fastener," and the other statements in the petition concerning the offer and rejection of these prayers (pp. 8, 9) are not supported by the record, and misrepresent the facts as they appear in the record at page 57. As pointed out above, the prayers offered in series were subsequently considered and passed upon separately, except four, which were abandoned by the defendant.

The statement in the petition at page 14, that petitioner and his counsel were denied inspection

of certain public records, is misleading and is not supported by the record, which shows at pages 28 and 29 the following (from the bill of exceptions):

> * * * It appeared by agreement of counsel that upon last Thursday the United States attorney had invited the defendant and his attorney to examine the papers at any time in his office. The United States attorney states that he needs the papers in evidence and that counsel or defendant will be given them in any place where their loss will be guarded against. * * *
>
> * * * * *
>
> The COURT. My desire is not to subject the papers to loss. If counsel will designate any particular papers that they want to obtain copies of or inspect, so that the district attorney may keep track of the papers, that may be done; the counsel may examine the papers, as the district attorney suggests, at any time they want; but I do not think counsel ought to take such an assortment of papers out of the custody of the district attorney.

* * * * *

In many other respects statements in the petition as to what the record shows are untrue and misleading in that they contain only part of the truth.

In conclusion, it is submitted that this is an ordinary criminal case, involving the construction and application of a purely local law, and that all

the questions involved have been passed upon already by two courts.

No question appears of such peculiar or general importance as to justify this court in issuing the writ of certiorari. It is submitted that the petition should be denied.

HENRY M. HOYT,
Solicitor-General.

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BRIEF FOR THE UNITED STATES.

STATEMENT.

The plaintiff in error, Thomas M. Fields, was indicted in the Supreme Court of the District of Columbia at the January term, 1905, for embezzlement. The defendant demurred to each of the eight counts of the indictment (Rec., p. 2), and the demurrer was sustained as to counts 4, 5, 7, and 8, and was overruled as to counts 1, 2, 3, and 6. (Rec., p. 4.)

The defendant then pleaded not guilty, his trial was begun on May 8, 1905, and on May 15 he was convicted under the third count and acquitted under counts 1, 2, and 6. (Rec., p. 18.)

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He moved in arrest of judgment (Rec., p. 19) and for a new trial (Rec., p. 20), and these motions being overruled, he was sentenced, on July 28, 1905, to be imprisoned and kept at labor in the penitentiary for five years. (Rec., p. 26.)

He appealed to the Court of Appeals of the District of Columbia, which modified the judgment of the Supreme Court of the District of Columbia by striking out the words "at labor," and, as so modified, affirmed it. (27 App. D. C., 433; Rec., pp. 75–85.)

Petitions for a rehearing and for the allowance of a writ of error having been denied by the Court of Appeals, a writ of error was sued out from this court, and a motion to dismiss the same is pending.

He has also filed a petition for a writ of certiorari to the Court of Appeals of the District of Columbia.

THE INDICTMENT.

The third count of the indictment, under which the plaintiff in error was convicted (Rec., p. 1–2) is as follows:

> And the Grand Jurors aforesaid, upon their oath aforesaid, do further present:
>
> That on the twenty-third day of November, in the year of our Lord one thousand, nine hundred and three, and at the District aforesaid, said Andrew A. Lipscomb and said Thomas M. Fields were receivers; that is, to say, were receivers under a certain order of the Supreme Court of the District of Columbia, holding an equity court, dated the sixth

day of November, in the year of our Lord one thousand eight hundred and ninety-four, in equity cause number fifteen thousand, nine hundred and seven, and entitled *The Washington Beneficial Endowment Association* versus *The Commercial Alliance Life Insurance Company;* that on the said twenty-third day of November, in the year of our Lord, one thousand nine hundred and three, the said Andrew A. Lipscomb and said Thomas M. Fields, as such receivers, had possession of a certain other large sum of money, to wit, the sum of fifteen thousand, nine hundred and seventy-four dollars and seven cents, which said fifteen thousand nine hundred and seventy-four dollars and seven cents, in money of the value of fifteen thousand nine hundred and seventy-four dollars and seven cents, being the property and moneys of the Washington Beneficial Endowment Association, a body corporate, had then and there come into such possession of them, the said Andrew A. Lipscomb and said Thomas M. Fields, by virtue of their office and employment as such receivers, and that they, the said Andrew A. Lipscomb and said Thomas M. Fields, so having the said fifteen thousand, nine hundred and seventy-four dollars and seven cents in their possession as aforesaid, on the said twenty-third day of November in the year last aforesaid, and at the District aforesaid, and while they were such receivers as aforesaid, did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby then and there embezzle the

same, against the form of the statute in such case made and provided, and against the peace and Government of the said United States.

THE STATUTE.

Section 841 of the District Code, effective January 1, 1902, under which this indictment is drawn, is as follows:

> Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both.

THE FACTS.

The evidence shows that the plaintiff in error and his codefendant were appointed on November 6, 1894, receivers in the case of *The Washington Beneficial Endowment Association* v. *The Commercial Alliance Life Insurance Company*, being equity cause No. 15907, in the Supreme Court of the District of

Columbia; that they took possession of the property in dispute, and on May 13, 1895, sold the real and personal property for $22,210, the sale being reported by them to, and ratified by, the court; that the proceeds of the sale were deposited in the West End National Bank, and on March 20, 1897, the balance in that bank was, by order of the court, deposited with the Washington Loan and Trust Company, at interest, pending appeal; that the receivers made reports from time to time, the first report being dated March 20, 1897, and the last report being dated November 23, 1903; that the auditor of the court also made several reports, one of his reports, dated July 31, 1900, showing a net balance in the hands of the receivers after allowing them credits for costs, charges, and commissions of $15,090.74; that the last report of the auditor, dated December 7, 1903, after adding interest on $15,090.74 from July 31, 1900 (said interest amounting to $1,532.26), and deducting costs, charges, and commissions, finds a balance in the hands of the receivers of $15,876.57; that on May 5, 1904, the court passed a decree ratifying the auditor's report of December 7, 1903, and ordering distribution of the balance found by the auditor; and that no distribution was in fact made, the said decree of May 5, 1904, not having been appealed from.

The testimony also shows that between March 20, 1897, and June 23, 1903, the receivers gradually reduced the certificates of deposits held by order of the court and opened other accounts in their personal names; that checks were drawn against said

accounts; that some of the withdrawals from the certificates of deposit, and some of the checks, agreed in amount with the particular amounts allowed the receivers by the auditor in his reports, "but certain of said withdrawals, and some of said checks, do not correspond with any credits allowed by the auditor or claimed by the defendant;" that nine or more of the checks were payable to the plaintiff in error, and were indorsed by him and paid over the bank counter to him in cash without further indorsement; that all the checks drawn after August 8, 1903, bore the genuine signature of the defendant and his coreceiver; that of $1,300 drawn on a check dated September 8, 1903, the defendant furtively delivered $1,000 in cash to his coreceiver. The testimony further shows that the defendant absconded in June, 1904, and was discovered and arrested on March 9, 1905, at Rayville, N. Y., where he was passing as Doctor Brown.

A more comprehensive and logical narrative of the facts, as proved at the trial, is impossible, on account of the incomplete character of the bill of exceptions.

The defendant offered testimony of three witnesses, but did not himself testify, and offered no testimony of good character.

BILL OF EXCEPTIONS.

Counsel for plaintiff in error contend that the bill of exceptions must be taken to contain the substance of all the testimony in the case, under the rulings of this court in the cases of *Clyatt* v. *U. S.*, 197 U. S., 207, and *Gunnison County* v. *Rollins*, 173 U. S., 255, and

of the Court of Appeals in the cases of *Klopfer* v. *D. C.*, 25 App. D. C., 41, and *Rockwell* v. *Capital Traction Company*, idem, 98.

In the *Clyatt* case it is held (syllabus):

> Where the bill of exceptions, after referring to the impaneling of the jury, contains recitals that the plaintiff produced witnesses, followed in each case by the testimony of the witness, at the close of all of which there were further recitals that the parties rested, these statements are sufficient, even in the absence of a technical affirmative recital to that effect, to show that the bill of exceptions contains all the testimony, and defendant is not to be deprived of a full consideration of the question of his guilt by such omission; and even in the absence of a motion to instruct the jury to find for the defendant this court may examine the question where it is plain that error has been committed.

And in the case of *Gunnison Co.* v. *Rollins* it is held that a bill of exceptions may be taken to include all the evidence, although it does not expressly state that fact, if the entries sufficiently ciently show that all the evidence is included.

In the *Klopfer* case the Court of Appeals said, at page 43:

> It is elementary law that in order that an appellate tribunal may pass intelligently upon the ruling of a trial court, the record must give and must purport to give the substance of all the testimony bearing upon such ruling.

The second paragraph of the syllabus of that case is as follows:

> A bill of exceptions in a case in which a verdict was directed for the defendant at the close of all the testimony is sufficient, although it does not in terms purport to contain all the testimony, or the substance of it, where it states, after giving in detail the testimony of the witnesses on both sides, that "counsel for both plaintiff and defendant announced that they had no further testimony to offer and rested their case," and it is not contended as matter of fact by the appellee that any substantial testimony has been omitted.

The first paragraph of the syllabus of the case of *Rockwell* v. *The Capital Traction Company* is as follows:

> The requirement that a bill of exceptions must show that all of the evidence has been set forth, in order to warrant an appellate court in determining whether there was error in giving or refusing an instruction to direct a verdict, is sufficiently complied with where the bill of exceptions purports to recite the evidence in the order of its introduction, giving the name of each witness, stating that the action of the court in directing a verdict for the defendant was "founded on all the evidence as above set forth on behalf of the plaintiff," and that each of the questions reserved by the plaintiff during the trial was upon the whole evidence, "the substance of which whole evidence is included in the bill of exceptions."

The Government insists that the bill of exceptions in the present case neither contains nor purports to contain the substance of all the testimony.

The doctrine announced in the cases above cited is not questioned, but it is submitted that the present case is not governed by them, but is distinguishable, for the reason that the bill of exceptions not only does not purport to contain the substance of all the testimony, but, taken by its four corners, affirmatively shows that it does not contain the substance of all the testimony.

Where a bill of exceptions purports to set forth all the evidence, yet affirmatively shows that there was other evidence not included therein, the court will not undertake to determine whether the verdict was sustained by the evidence.

U. S. v. *Lowenstein*, 21 D. C., 515.

The Court of Appeals, after having its attention directed to the foregoing decisions, both of this court and its own, decided that this bill of exceptions is not to be taken as containing the substance of all the testimony.

In the case at bar there is no statement or combination of statements which can be distorted into an admission that the bill of exceptions contains the substance of all the testimony. The bill of exceptions, after setting out certain testimony, contains at the bottom of page 53 the following statement:

> At this point the U. S. Attorney, Mr. Beach, said: "The Government rests, if it please the court."

Pages 54, 55, and 56 contain the substance of the evidence offered by the defendant as shown by the following statement on page 56:

> The foregoing is the substance of all the evidence offered by the defendant, who thereupon rested.

This is followed by the statement:

> The Government then announced that it had no further evidence to offer.

There is nothing else anywhere in the bill of exceptions referring to whether or not the bill contains the substance of the testimony.

Counsel for the plaintiff in error contend that the last quoted statement, taken in connection with the preceding statements, makes a case similar to the *Klopfer* case, but it is submitted that the only significance of the last quoted statement is that the Government had no evidence in rebuttal to offer.

A reference to the general charge of the court, to which no exceptions were taken by the defendant, clearly shows that the court instructed the jury upon questions of fact concerning which no reference is made in the bill of exceptions. One of these charges is at the bottom of page 68 of the record, in reference to letters in the nature of confessions, which had been offered in evidence by the Government, which are not mentioned in the bill of exceptions.

The following facts concerning one feature of the evidence makes it patent that the bill of exceptions

does not contain nor purport to contain the substance of all the evidence:

At page 37 of the record it appears that the witness Hawken identified the "supplemental account of the receivers, dated November 23, 1903, bearing the genuine signature of the defendant."

Beginning at the bottom of page 45 the following appears:

> Mr. EASBY-SMITH. I now offer the final report of the Auditor, filed December 7, 1903. It is undated.
>
> Mr. BAKER. Do you claim the receivers made a report after this?
>
> Mr. EASBY-SMITH. I do.
>
> Mr. BAKER. Where is that report? Let me see it.
>
> Mr. EASBY-SMITH. I have not offered it yet.
>
> Mr. BAKER. I should like to look at it. We object to this because it would appear that the report of the receivers to which Mr. Easby-Smith refers was made before this report of the Auditor—November 23, 1903, and on the back of it is "Filed November 23, 1903."
>
> Mr. EASBY-SMITH. That is not a court filing.
>
> Mr. BAKER. No, not a court filing; but it was identified.
>
> Mr. EASBY-SMITH. Merely as to the signatures.
>
> Mr. BAKER. And this report of the Auditor was filed December 7, 1903, and after the date laid in the indictment.

> The COURT (after argument). The date does not cut any figure. The fact that the date is in that paper does not prove it was filed that day or made that day.

There is no further mention, anywhere in the bill of exceptions, of this account of the receivers, dated November 23, 1903, "bearing the genuine signature of the defendant," which the Government, at page 45, had not yet offered; but it is clear, from an examination of the indictment and a reading of so much of the testimony as appears in the bill, that this account of the receivers of November 23, 1903, was the pivotal fact in the case—was, indeed, the keystone of the whole prosecution. Yet, if this bill is to be taken as containing the substance of the evidence, this supremely important document was not even offered in evidence.

Another circumstance to be considered is that while the bill makes the statement that it contains "the substance of all evidence offered by the defendant," it makes no such statement concerning the Government's evidence, not even the statement that the bill contains "the substance of all the evidence relating to the defendant's exceptions."

All that it does contain are portions of the evidence and a number of statements, albeit true, shrewdly thrown in here and there for the purpose of making the bill, taken as a whole, appear to conform with the *Clyatt* and *Klopfer* cases, both decided a very short time before the bill was prepared.

But examined closely it does not comply with the requirements of the *Clyatt* case; it does not contain

"recitals that the plaintiff produced witnesses, followed in each case by the testimony of the witness." The witnesses, Parker and Eckloff, are mentioned (pp. 40, 41), but the substance of their testimony is not pretended to be given, and the statement on plaintiff in error's brief, at page 202—

> Then follows the testimony of various other witnesses for the United States, including Young, *Parker, Eckloff*, Pinchback, Schayer, Donaldson, Tyser, Robinson, and Padgett, that of each being preceded by a statement in form similar to this:
>
> The United States then offered as a witness in its own behalf Dr. Young, * * * who, having been duly sworn, testified as then recited—

is not true as to the witnesses Parker and Eckloff. And in the case of no witness is it stated that he "testified as follows" or "testified in substance."

It affirmatively appears that there were witnesses produced for the Government who gave testimony, but are not even named in the bill. (See Rec., 39.)

On the brief of the plaintiff in error, at page 204, appears the following statement:

> In the trial court it was stipulated in writing by the then counsel for the Government that this bill contains the substance of all the evidence in the case having relation to or in anywise connected with our exceptions.

This statement is beyond the record, but, as an admission of counsel for plaintiff in error, it has a significant bearing upon this question. If there was

such a stipulation (and there was), it must have been in the bill of exceptions itself (as it was), and not being now in the bill must have been stricken out by the trial judge before he signed the bill (as it was). Therefore the bill is not to be taken to contain either "the substance of all the testimony" or "the substance of all the testimony relating to the defendant's exceptions."

Counsel can not stipulate the correctness of a bill of exceptions not signed by the trial judge. (*Malony* v. *Adsit*, 175 U. S., 281.)

The contention of counsel for plaintiff in error that this bill of exceptions contains the substance of all the testimony has, therefore, no foundation in fact, and the arguments based upon the contention are untenable, whether relating to instructions granted or refused by the trial court, or to the sufficiency of the evidence, or to the general charge of the trial justice, or to the alleged misconduct of the prosecutors concerning statements made in the course of argument to the jury concerning matters not elsewhere referred to in the bill of exceptions.

A judgment entered on the verdict of a jury will not be reversed by the Supreme Court on writ of error upon the ground that there is absolutely no evidence to sustain it, where the bill of exceptions does not show that the evidence contained therein is all the evidence that was given on the trial.

(*U. S.* v. *Copper Queen Min. Co.*, 185 U. S., 495.)

The court will not pass upon the correctness of a charge which depends upon the evidence in the case, unless there is a bill of exceptions setting out the evidence.

U. S. v. *McBride*, 18 D. C., 371.

CONSTRUCTION AND APPLICATION OF THE STATUTE.

The plaintiff in error attempted in the trial court and in the appellate court, and now attempts in this court, to draw in question the validity of the foregoing statute. An examination of the record demonstrates that this question has not been and can not be properly raised in this case.

In his demurrer to the indictment the defendant sets down, among others, the following points:

> *i*. Neither said section 841 of the said Code of Law for the District of Columbia, nor any other law, applies to receivers appointed before January 1, 1902.
>
> *j*. The said section 841 is unconstitutional and void, because the forfeiture clause thereof operates to deprive the citizens of their property without due process of law; it denies them the equal protection of the laws; it inflicts cruel and unusual punishment; it takes private property for public or private use without compensation, and divests vested rights; especially so if given any retroactive effect. (Rec., p. 3.)

In his motion in arrest of judgment he again attempts to raise the question.

> 2. Because Code, sec. 841, is unconstitutional and void in that it attempts to make a receiver or other fiduciary guilty of embezzling his own property, by forfeiting all right or claim to any vested commissions, costs, and charges, and declaring him guilty of embezzlement of the entire amount or value of the money or other property coming into his possession. (Rec., p. 19.)

It is to be noted that the words of the statute are "shall be deemed guilty of embezzlement of the entire amount or value of the money or other property *so coming into his possession and converted or appropriated* to his own use."

In his statement of supposed errors, filed in the Court of Appeals, the appellant says:

> The court erred: 1. In holding Code of the District of Columbia, section 841, to be retrospective and applicable to this case. 2. In holding said section so construed and applied to be constitutional.

We have, then, in both courts, two questions attempted to be raised—one as to the *construction* and *application* of the statute, the other as to the *constitutionality* or *validity* of the statute.

It is to be observed that in the "statement of case and assignment of errors" filed in this court March 5, 1907, the plaintiff in error does not raise the question of *constitutionality* or *validity* of the statute.

It is, indeed, argued that forfeiture is part of the punishment and should have been included in the

judgment and that the judgment, not including forfeiture, is void.

This question will be discussed later under the head of "the judgment."

But the argument that forfeiture should be included in the judgment reduces the question to one of the *construction* and *application* of the statute and not of its *validity*. So in the last analysis the questions raised by the plaintiff in error all refer to the construction and application of section 841 of the District Code and not to its constitutionality.

It is argued that the statute is not applicable to this case, because it is purely prospective and includes only receivers appointed after January 1, 1902, when the Code went into effect, and property which comes into the possession of such receivers after said date.

The Government did not, and does not, contend that this section has any retroactive in the sense of *ex post facto* effect, or that it pretends to or can denounce any act committed before it went into effect.

A retrospective law is one which contemplates or affects an act done or a right accrued before its passage. (8 Cyc., 1017.)

Section 481 of the Code is in no sense an *ex post facto* law.

An *ex post facto* law is one which imposes a punishment for an act which was not punishable when it was committed, imposes additional punishment, or changes the rules of evidence by which less or different testimony is sufficient to convict.

In plain words, the plaintiff in error contends that under this law a receiver who was appointed and received property on December 31, 1901, could with impunity convert to his own use that property, then or on any day thereafter.

The Government's contention, on the other hand, is that this section is intended to cover any act of embezzlement committed after the law went into effect, regardless of the mere time the property came into the possession of the person committing the act.

Plaintiff in error claims that the words "may come" must necessarily be construed as of the future and as of the time when the property is received.

The Government contends that these words are merely part of the description of the property made the subject of embezzlement, and have no reference to time, either past or future. It was clearly the intention of Congress to punish all future acts of embezzlement by receivers and other fiduciaries. That the phrase "may come" as used in this section, in contradistinction to the words "who shall fraudulently convert," occuring in the same sentence, was used advisedly by Congress, and was intended to be merely descriptive of the sort of property made the subject of embezzlement, seems self-evident. In order to sustain the contention of plaintiff in error, it is necessary to substitute for the word "may" the word "shall," and utterly disregard the clear intent and spirit of the statute.

The old rule requiring a rigidly strict construction of penal statutes has been relaxed greatly since the

days when many offenses were punishable by death.

In a long line of cases, beginning with the case of *United States* v. *Wiltberger*, 5 Wheat., 76, this court has uniformly held that the intention of the legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the legislature.

> See also, to the same effect, *American Fur Co.* v. *U. S.*, 2 Pet., 358; *U. S.* v. *Morris*, 14 Pet., 464; *U. S.* v. *Reese*, 92 U. S., 214; *U. S.* v. *Hartwell*, 6 Wall., 385.

In the case of *Bolles* v. *Outing Company*, 175 U. S., 262, cited by plaintiff in error, this court said (p. 265):

> The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial. *In both cases it will endeavor to effect substantial justice.*

And in *Lau Ow Bew* v. *United States*, 144 U. S., 47, 59, it was said:

> Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion.

The words "may come" in this statute are merely descriptive of the property which is made the subject of embezzlement; that is, a receiver into whose possession property "*may come by virtue of his office,*" who shall fraudulently convert the same to his own use, shall be guilty of embezzlement of the property *so coming* into his possession and converted. *How coming? Coming by virtue of his office.*

The sense of the words is not dependent upon tense, either past or future. They are descriptive. They are expressive of mere potentiality.

The only portion of the statute necessarily future in its operation is the conversion "who *shall* fraudulently convert or appropriate."

What was the real intent of the legislature may be better ascertained by considering the other sections of the District Code relating to embezzlement.

Section 833 provides:

> Whoever *being charged* with the collection, receipt, etc., of property * * * *fraudulently converts* * * * the property * * * *received, controlled,* or *held* by him * * * shall be deemed guilty of embezzlement.

Section 837 provides:

> Any person *intrusted* with anything of value, etc., who *fraudulently converts* the same * * * shall be deemed guilty of embezzlement.

Section 838 provides:

> Any warehouseman * * * who * * * converts to his own use any property *intrusted* or *consigned* to him * * * shall be deemed guilty of embezzlement.

In these sections the present participle, "being charged" and the past participles "received," "controlled," "held," "intrusted," "consigned," are used in their descriptive capacity, and without reference to time or tense.

In *Murphy* v. *Wheatley*, 100 Md., 358, it is held that a law governing corporations refers to a trust company subsequently incorporated by a special act of the legislature, as well as to corporations already incorporated, the language of the law being "every * * * company *incorporated* under any law of this State."

Endlich, in his Interpretation of Statutes, says:

> SEC. 280. But a statute is not retrospective in the sense under consideration because a part of the requisites for its action is drawn from a time antecedent to its passing. (*Per* Lord Denman in *R.* v. *St. Mary*, 12 Q. B., 127; *R.* v. *Christchurch*, idem., 149.) * * * The court of chancery, which acquired jurisdiction under the 23 and 24 Vict., c. 35, to relieve in respect of the forfeiture of a lease in consequence of a breach of a covenant to insure, exercised this new jurisdiction where the breach occurred after, but the lease had been made before the act was passed. (*Page* v. *Bennett*, 2 Giff., 117; 29 L. J. Ch., 398.) * * * And so an act "for the better security of mechanics" was held applicable when the work was done after the law took effect, though the contract therefor was entered into before its passage. (*Miller* v. *Moore*, 1 E. D. Smith (N. Y.), 739.)

And as to the application of new laws to a continuing state of affairs see Lewis's Sutherland on Statutory Construction, section 674.

Endlich says again:

> SEC. 283. It is hardly necessary to add, that (constitutional objections being out way) whenever the intention is clear that the act should have a retrospective operation, it must unquestionably be so construed, however unjust and hard the consequences may appear. (Citing: *Stead* v. *Carey*, 1 C. B., 496; *Bell* v. *Bilton*, 4 Bing., 615.) Retrospective laws, unless *ex post facto*, or impairing the obligations of contracts, do not fall within the prohibition against such laws contained in the Constitution of the United States. (Citing: *Calder* v. *Bull*, 3 Dall., 386; *Satterlee* v. *Matthewson*, 2 Pet., 413; *Watson* v. *Mercer*, 8 Pet., 88; *People* v. *Supervisors*, 63 Barb. (N. Y.), 85; *Reed* v. *Beall*, 42 Miss., 472; *Grim* v. *School Distr.*, 57 Pa. St., 433; *Lane* v. *Nelson*, 79 Pa. St., 407; *Smith* v. *Gilder*, 26 Ark., 527.) * * * Hence, within the scope of legislative power, an act will, and must, be given a retroactive efficacy, where such an intention clearly appears. (*Bambaugh* v. *Bambaugh*, 11 Serg. & R., (Pa.) 19.)
>
> See also Endlich, section 321, and cases cited, including *Woodbury* v. *Freeland*, 82 Mass., 105; *Maysville, etc., R. R. Co.* v. *Herrick*, 13 Bush. (Ky.), 122.

Upon this question see also Lewis's Sutherland on Statutory Construction, sections 335, 580, and 674.

The statute of 1839 (Ky.) authorizing adminis-

trators to file bills against heirs, etc., and the court to decree sales of real estate, applies to cases where the decedent died before its passage as well as where he died afterwards.

Fitzhugh v. *Fitzhugh's Adm.*, 6 B. Mon., 4.

The law is clearly applicable to the facts of the present case, and was correctly construed and applied by the trial court and the court below. As so construed and applied it is not an *ex post facto* law. The forfeiture clause is not, nor has it been, in issue in this case.

PORTION OF THE EMBEZZLED FUND RECEIVED AFTER THE CODE TOOK EFFECT.

In the preceding argument it has been assumed that all of the property embezzled was received before the statute took effect.

But it appears from the reports of the Auditor (Rec., p. 36) that on July 31, 1900, the receivers were chargeable with a net balance of $15,090.74 (the money being invested in interest-bearing certificates of deposit under the order of court of March 20, 1897); that on December 7, 1903, they were chargeable with an additional amount, for interest, namely, $1,532.26, received between July 31, 1900, and December 7, 1903, the greater portion of this interest having been earned and received by the receivers after January 1, 1902, when the Code became effective.

So that a portion, at least, of the property embezzled by the plaintiff in error was received by him after the Code took effect.

SUFFICIENCY OF THE INDICTMENT.

The indictment, above set out, charges that the plaintiff in error and another were receivers appointed by the court on November 6, 1894; that as such receivers they had possession of $15,974.07, the property of the Washington Beneficial Endowment Association, which had come into their possession by virtue of their office and employment as such receivers; and that on November 23, 1903, in the District of Columbia, they "did unlawfully and fraudulently convert and appropriate the same to their own use, and did thereby embezzle the same."

All the elements of the offense of embezzlement are here set forth with precision and certainty.

Evans v. *U. S.*, 153 U. S., 584, 587.
Potter v. *U. S.*, 155 U. S., 438, 445.
Moore v. *U. S.*, 160 U. S., 268.

The conversion is clearly enough alleged in the indictment, which states that the receivers "did unlawfully and fraudulently convert and appropriate the same to their own use."

The words "convert to his own use" have a well-known legal signification; and it is not necessary in an indictment charging embezzlement to allege the particular means by which the conversion was effected.

Gassenheimer v. *U. S.*, 26 App. D. C., 432.
Moore v. *U. S.*, *supra.*
Grin v. *Shine*, 187 U. S., 181, 189.

And it is a well-known rule of pleading that less particularity is required when the facts lie more

in the knowledge of the opposite party than of the party pleading.

> Perry, Common Law Pleading, 378.
> *Rider* v. *Smith*, 3 T. R., 766.
> *Denham* v. *Stephenson*, 1 Salk., 355.
> *Attorney-General* v. *Meller*, Hard., 451.
> *Gale* v. *Reed*, 8 East., 80.

The criminal intent to defraud was clearly enough alleged by the use of the word "fraudulently."

> *State* v. *Reynolds*, 65 N. J. L., 424.

MOTION FOR BILL OF PARTICULARS.

The motion to compel the Government to furnish a bill of particulars was served on the United States attorney Thursday, May 4, 1905, and was called up on Monday, May 8, 1905, the day set down for the trial of the case. The United States attorney objected to the consideration of the motion because he had had only one clear day's notice of the motion, namely, Friday, whereas rule 88 of the common-law rules of the Supreme Court of the District of Columbia requires two days' notice.

The record shows (page 29) that—

> the court requested to hear the point of the motion and after hearing the said motion read and argued, declined to grant it, because the court concluded that it was without merit; and then the said objection was by the court sustained.

This motion came too late under the rule, and would have been too late even in the absence of the rule, the trial having been set for the same day the motion was called up, more than a month after the indictment was

filed. Furthermore, it was properly refused on the merits, for, in a case of embezzlement by a receiver or other fiduciary, the facts and particulars of his trust are peculiarly within his own knowledge.

On motion of the accused the prosecutor may be required to file a bill of particulars in a criminal case; but the granting of such a motion is within the sound discretion of the trial court.

Lauer v. *D. C.*, 11 App. D. C., 453.

MOTION TO RESTORE PAPERS.

The exception of the plaintiff in error to the refusal of the court below to order certain papers restored to the clerk's office seems sufficiently disposed of by an examination of the record relating to the proceedings in court concerning this motion, at page 29, Record, and of the affidavit of the United States attorney, at the top of page 17.

The contention of plaintiff in error that he and his counsel were denied inspection of certain public records is misleading and is not supported by the record, which shows at pages 28 and 29 the following (from the bill of exceptions):

> * * * It appeared by agreement of counsel that upon last Thursday the United States Attorney had invited the defendant and his attorney to examine the papers at any time in his office. The United States attorney states that he needs the papers in evidence and that counsel or defendant will be given them in any place where their loss will be guarded against. * * *
>
> * * * * *

> The COURT. My desire is not to subject the papers to loss. If counsel will designate any particular papers that they want to obtain copies of or inspect so that the district attorney may keep track of the papers, that may be done; the counsel may examine the papers, as the district attorney suggests, at any time they want; but I do not think counsel ought to take such an assortment of papers out of the custody of the District Attorney.

It nowhere appears that the plaintiff in error was prejudiced in the slightest degree by the course pursued by the trial court.

MOTION FOR CONTINUANCE.

This court has said, in the case of *Isaacs* v. *U. S.*, 159 U. S., 487, 489:

> That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question.

The doctrine is particularly well settled in the District of Columbia that an application for the continuance of a cause is addressed to the sound discretion of the court, and its action therein is not subject to review, except in cases of clear abuse of this discretion.

Bradshaw v. *Stott*, 7 App. D. C., 276.
Foertch v. *Germuiller*, 9 App. D. C., 196.

The grounds for this motion were (1) the issuing of the commission to take testimony of two New York witnesses and letters rogatory to take the testimony of a witness in London, England, and the absence of these witnesses, and (2) that defendant and his counsel had not had sufficient time to prepare his defense.

It is to be observed that when the court granted the commission the order concluded (Rec., p. 7): "Ordered that upon application of the defendant, process issue commanding said William T. Gilbert and Henry D. Hotchkiss to appear at the trial of this case." This order was made on May 4, four days before the trial came on. Subpœnas in a criminal case out of a court of the United States run anywhere within the territorial limits of the United States. If Gilbert and Hotchkiss could have been reached so as to give their testimony in New York, they could have been reached by compulsory process.

Furthermore, the plaintiff in error did not state in his affidavit (Rec., pp. 10–16) the specific facts which he expected to prove by the absent witnesses, but rather, for the most part, conclusions; nor did he state that he believed the testimony, which he expected the witnesses to give, to be true; nor did the affidavit comply otherwise with the rules laid down in the authority cited in his brief at pages 85 to 87.

As to the second ground, that he and his counsel had not had time to prepare his defense, his own affidavit shows that he had had more than a month.

Clearly there was no abuse by the trial court of its undoubted discretion in overruling the motion.

This argument refers also to the defendant's thirtieth exception to the ruling of the court denying defendant's motion to withdraw a juror and discharge the jury because the defendant had not crossed the defendant's interrogatories to his New York and London witnesses. (See Rec., bottom of p. 56.)

EXCEPTIONS AS TO ADMISSIBILITY OF COURT PAPERS IN THE EQUITY CAUSE.

The plaintiff in error attempts to raise here the question that the court papers in equity cause No. 15907 and consolidated cases, which were offered and received in evidence in the trial court, were not properly proved.

He also assigns as error the admission of the court papers in violation of section 860, Revised Statutes, United States.

His contention that these questions were raised in the court below or that any objection on such ground was made as to any single court paper offered in evidence is absolutely without foundation.

The offers as to these papers, objections to their admission, and the manner and extent in which they were received in evidence, appear in the record as follows, as to each of said papers:

The original bill was offered and received in evidence without objection (Rec., p. 30).

The order appointing the receivers was offered (p. 31), was objected to by the defendant because passed before the Code took effect, because of vari-

ance between it and the indictment, and these objections were overruled and the order admitted (p. 32).

The order of sale was offered (p. 32), objected to because it shows property coming into the hands of the receivers before the Code, because it was dated December 1, 1894, and because it shows on its face that the property is real estate. The objections were overruled and the order admitted (p. 32).

The report of sale made by the receivers was offered, objected to for the same reasons as set out as to the last preceding paper, and was admitted in evidence (p. 32).

The order *nisi* ratifying the sale was objected to for the reasons last stated, and because it is irrelevant and immaterial, and because it does not relate to the property described in the indictment, because there is nothing to show that the receivers had any connection with the paper, and because it states the price for which the property was sold, and the paper was admitted (p. 32).

Final orders ratifying the sale of realty and personalty were offered, the same objections were made as to the order of sale and order *nisi*, and the papers were admitted (p. 32).

The decree of Justice Cox of June 27, 1896, was offered and received without objection as showing a reference to the auditor only (p. 33).

A report of the defendants, dated March 20, 1897, as to deposit of proceeds of sale, and an order passed the same day authorizing and approving deposit were offered, were objected to for the reason that the report

and order preceded the Code, and the papers were admitted (p. 34).

Three reports of the defendant as receiver, bearing the defendant's genuine signature, were offered, were objected to by the defendant because there was nothing to show that they were court papers and parts of the record, because they are statements in regard to money that came into the defendants' hands before the Code, because they antedated the Code and the statute of limitations, but the reports were received in evidence (pp. 34–35).

The auditor's report of July 31, 1900, was offered and was objected to by the defendant because it contains findings of facts, and it was not at that time admitted in evidence (pp. 35–36).

The auditor's report, filed December 7, 1903, was offered (p. 36), and was again offered (p. 45). It was objected to because it would appear that the final report of the receivers was made before this report of the auditor (p. 46). It was again offered, after said objection, as to the schedule of Lipscomb & Fields, and as to the schedule of distribution. Objection was made without stating the reason of the objection p. 46). It was finally received in evidence as to both schedules thereof (p. 47).

The decree of Justice Cox of June 27, 1896, was reoffered (p. 46), was objected to by the defendant "for the same reasons stated in his former objections to said decree" (there had been no former objection to the said decree, it appearing at page 33 that the said decree was offered in evidence without objection

as tending to show a reference to the auditor only), and the objection was sustained as to the second clause and the first clause was admitted.

The auditor's report of July 30, 1900, was offered as to Schedule A, to which the defendant objected, without stating any reason, and "only said Schedule A of said report was received in evidence" (p. 45).

The auditor's report of August 30, 1900, was offered, to which defendant objected, for the reasons stated in the last exception (there being no reasons stated in said last exception), and the said report was received in evidence (p. 45).

The decree of May 5, 1904, ordering distribution in equity No. 15907 and consolidated cases, including equity No. 16072 (in which appellant was a party defendant, Rec., pp. 50–51), was offered (p. 47), objected to by the defendant for the reasons stated in his exception 23 (namely, because it postdated the time of the offense alleged in the indictment, (p. 47), and the decree was admitted.

Original bill in equity No. 16072 (*James S. Edwards, adm.*, v. *The Washington Beneficial Endowment Association, The Commercial Alliance Life Insurance Company, and Andrew A. Lipscomb and Thomas M. Fields, receivers*) an order consolidating said cause with equity No. 15907, demurrer of Lipscomb & Fields, and the answer of Lipscomb & Fields, bearing the genuine signature of the appellant, were identified (Rec., p. 49).

The bill in equity No. 16072 was offered and objected to by the defendant as irrelevant, because

he is not charged as receiver in said cause; overruled. Defendant withdrew his objections to paragraphs 18 and 19 of said bill, and they were received in evidence (p. 49).

The order of consolidation was offered, the same objections made, and the order admitted (p. 49).

The answer of Lipscomb and Fields was offered as to paragraphs 18 and 19 and admitted without objection.

The whole bill in equity 16072 was reoffered, objected to for the same reasons by the defendant, and the objections were sustained except as to "the endorsements, with the file marks on the bill, the caption showing the interested parties, the opinion if there is one, and paragraphs 18 and 19" (p. 49).

The foregoing are all the court papers which appear in the bill of exceptions to have been received in evidence; and it appears that to no single one was objection made on the ground that it was not properly proved.

The only three papers to which such objections were urged were the three reports of the defendant, offered and admitted (pp. 34–35), and the objection was "because there is nothing to show that they are court papers and part of the record in this equity case."

They were identified by the witness Hawken "as being among said (court) papers, but not filed in the clerk's office." The witness identified the defendant's genuine signature on said papers.

Therefore these papers were not proved to be, or offered as, court papers, but as statements made and signed by the defendant.

It clearly appears, therefore, that the question as to whether or not the court papers were properly proved was not raised below, and that the assignments of error in this respect have no foundation in the record.

Nor was section 860, Revised Statutes, mentioned in any objection to the introduction of court papers.

Taken altogether, the competency and relevancy of each of the court papers received in evidence is clearly apparent, despite the interminable arguments and laborious citation of cases in the brief of the plaintiff in error.

An appellate court will not pass upon a general objection to testimony, or upon any reason for objection which is not stated at the time of the objection in the trial court.

An objection to evidence which does not point out the specific ground upon which it is made will be disregarded on appeal.

Wash. Gaslight Co. v. *Poore*, 3 App. D. C., 127.

An objection to a question as "immaterial, incompetent, and inadmissable" will not be considered on appeal when the record shows no more specific ground of objection nor whether the question was answered.

Hazleton v. *Le Duc*, 10 App. D. C., 379.
Moore v. *Bank*, 13 Pet., 302.

Catts v. *Phalen*, 2 How., 376.
Carter v. *Carusi*, 112 U. S., 478.
D. C. v. *Woodbury*, 136 U. S., 450.
Woodbury v. *D. C.*, 5 Mackey, 127.
Prindle v. *Campbell*, 18 D. C., 598.

Several of the objections to the admissibility of the papers in the equity cause are based on the fact that they show that the property mentioned in them is not money, as described in the indictment, but is real estate. But the defendant admitted, in the reports signed by him (p. 34), and in his answer to the bill in equity cause 16072, that he had taken possession of the real estate and had converted it into money, and had possession of that money.

> A prosecution for embezzlement may follow money embezzled through a dozen investments, so long as it is in the embezzler's hands.
> Wharton, Criminal Law, sec. 1016.

EXCEPTIONS TO ADMISSION OF BANK DEPOSIT SLIP.

The bank deposit slips, although written by bank clerks, were clearly competent for the reason that the Government offered to prove and did prove that the defendant checked against the accounts to which said deposit slips related (Rec., p. 39).

EVIDENCE AS TO DIFFERENT ACTS.

It is assigned as error that the trial court erred in receiving evidence of 92 separate items, each claimed to be in itself a substantive act of embezzlement and received in evidence as such, under the

indictment alleging but a single act on one certain date.

The following extract from the general charge of the trial justice (Rec., p. 69) shows that the jury was fully, carefully, and correctly instructed as to its duty in considering this evidence:

> Respecting a point which was touched upon by the district attorney—although this indictment charges the defendant with having embezzled the sum of $15,974, it is not essential that the proof should go so far as to make out that particular sum, and inasmuch as the evidence has dealt with more than a single transaction, in the way of drawing checks and the like, which the Government claims in itself was an embezzlement, I will point out to you the considerations which ought to guide your deliberations in your dealing with those various items.
>
> If you find from the evidence that after January 1, 1902, the defendant conceived a plan to embezzle this fund systematically, and he did embezzle it at different times in accordance with that preconceived plan, then you would be justified in finding him guilty concerning all the embezzlements that you find the proof makes out; but if you find that there was not such a plan preconceived by him before a first embezzlement, and conclude from the evidence that each conversion by him, if there was a fraudulent conversion by him, was in itself distinct from every other, if there were other fraudulent conversions, then you would only

be justified in that state of affairs in finding him guilty upon one single conversion, concerning which all of you must agree. But in determining, in that aspect of the case, the question of his guilt upon a particular conversion, you will be entitled to take into consideration evidence which you find proves other conversions of the same fund; but only as tending to aid you in coming to a conclusion upon the question of intent—if you find he converted an item in question, whether or not you believe that the conversion of that particular item was done with fraudulent intent.

CORPORATE EXISTENCE OF THE WASHINGTON BENEFICIAL ENDOWMENT ASSOCIATION.

The laws under which the Washington Beneficial Endowment Association was incorporated were the acts of Congress of June 17, 1870, and May 5, 1870, as contained in sections 553 *et seq.* of the Revised Statutes for the District of Columbia, published in 1875. Section 553 is as follows:

> Any three or more persons who desire to form a company for the purpose of carrying on any kind of manufacturing, agricultural, mining, mechanical, insurance, mercantile, transportation, or marketing business, in the District or savings bank therein, may make, sign, and acknowledge before some officer competent to take the acknowledgment of deeds, and file in the office of the recorder of deeds, a certificate in writing, in which shall be stated:

First. The corporate name of the company and the object for which it is formed.

Second. The term of its existence, not exceeding twenty years, except in cases of corporations formed only for the purpose of life-insurance.

Third. The amount of the capital stock of the company and the number of shares of which said stock shall consist.

Fourth. The number of trustees who shall manage the concerns of the company for the first year, and their names.

Fifth. The name of the place in the District in which the operations of the company are to be carried on.

Section 557, which provides that the failure to elect trustees shall not dissolve the corporation, is as follows:

> In case it shall happen at any time that an election of trustees shall not be made on the day designated by the by-laws of said company, when it ought to have been made, the company for that reason shall not be dissolved, but it shall be lawful on any other day to hold an election of trustees, in such manner as shall be provided by the by-laws, and all acts of trustees shall be valid and binding as against said company until their successors shall be elected.

The corporate existence of the Washington Beneficial Endowment Association was proved at the trial of this case in two ways—first, by introducing in evidence a copy of the original certificate of incorpo-

ration, and, secondly, by oral testimony proving its *de facto* corporate existence.

The copy of the certificate of incorporation was introduced in evidence in the following manner (Rec., pp. 41–42).

Walter A. Pinchback testified that he is employed in the office of the recorder of deeds and that he had searched for the original certificate of incorporation of the Washington Beneficial Endowment Association in the files where it ought to be kept and that he could not find it. He produced and identified two books, numbered 1 and 2, called Acts of Incorporation, and testified that book numbered 1 began May 23, 1870. The liber copy of the certificate of incorporation of the said association was then offered in evidence; and the Government then called Colonel Schayer, who testified that he was employed in the office of the recorder of deeds for more than thirty years, a portion of the time being from 1869 to 1886; that in said office was kept a series of libers called Acts of Incorporation; that they were kept under the general incorporation act of Congress; that the custom was to record all certificates whether required by law to be recorded or not; that a ruling of the office required them to be copied; that he knows the handwriting of the copyist who made the liber copy of the certificate of incorporation of the Washington Beneficial Endowment Association; that that copyist is now dead; that it was his duty to make the copy in the said liber and compare it with the original.

The liber copy of the said certificate was then received in evidence. It appears at page 43 of the record.

Among the incorporators of the association, as appears from the certificate, was one R. B. Donaldson.

The *de facto* existence of this corporation was proved in the following manner:

R. B. Donaldson testified that he was one of the incorporators of the Washington Beneficial Endowment Association; that he thought the said association was incorporated in 1873; that he was not only an incorporator but was president for twelve years; that it had a secretary and treasurer; that it carried on a life insurance business; that he was not a stockholder in 1893 or 1894 and had no knowledge as to whether the company carried on business since 1893 (Rec., p. 44).

John Joy Edson, a witness for the defendant, testified that he was a stockholder of the said association at the time it failed in 1894; that it was then doing business on Tenth street (Rec., p. 54).

One Eckloff, cashier of the Second National Bank, testified that he knew there was at one time in existence in Washington the Washington Beneficial Endowment Association, and that it did business; that he knew Mr. Gardner, its president; that he never had a policy in it but paid other policies and paid Mr. Gardner; that he paid other people's premiums for them; that it was in 1879 or 1880 when he knew that it was doing business at No. 419 Tenth street, N. W.;

that he does not know when it ceased to do business, but understands that it did cease (Rec., p. 41).

The various pleadings in equity cause No. 15907 and consolidated cases, which appear in the record, show that the Washington Beneficial Endowment Association was sued as a corporation, and that in these very suits the plaintiff in error was not only a receiver, but was an actual party defendant.

It also clearly appears from the various documents and oral testimony in the record that the said association owned and occupied in its corporate name the very real estate which was the basis of the equity suit No. 15907, and which was the very property taken possession of by the defendant as receiver.

The method in which corporate existence may be proven in criminal proceedings is set down in the tenth volume of the Cyclopedia of Law and Procedure, page 242, as follows:

> In criminal prosecutions, when the question arises whether the company is incorporated, for instance, in the case of a prosecution for a larceny of the property of an alleged corporation, or for the forgery of the bills of an alleged banking corporation, it is only necessary to show that the corporation exists *de facto*, and this may be proved by general reputation; in other words, by proving by oral testimony that it is a corporation *de facto*, doing a business as such. In such a proceeding proof of the existence of the corporation may, indeed, be demanded, but it seems that it is never necessary to produce the charter; and in a criminal

> prosecution for trespass upon the property of an alleged corporation, it has been reasoned that it is enough that the body described as a corporation is in the possession of the land described in the indictment, under its corporate name and was so in possession long before the commission of the trespass.

Citing the following among other cases:

> *People* v. *Frank*, 28 Cal., 507.
> *Smith* v. *State*, 28 Indiana, 321.
> *People* v. *Caryl*, 12 Wend. (N. Y.), 547.
> *State* v. *Thompson*, 23 Kansas, 338.
> *Reed* v. *State*, 15 Ohio, 217.
> *People* v. *Barrie*, 49 Cal., 342.
> *Johnson* v. *People*, 4 Den. (N. Y.), 364.
> *Searsburgh Turnpike Co.* v. *Cutler*, 6 Vermont, 315.

In the same volume of the same work, at page 241, the following doctrine is laid down:

> The existence of a corporation may be proved by reputation, and by its actual use for a length of time of the powers and privileges of a corporation; and this, we shall see, is the mode of proof in criminal cases.
>
> See also *U. S.* v. *Amedy*, 11 Wheat., 392, 409.
> *Stockbridge* v. *West Stockbridge*, 12 Mass., 399.
> *Dillingham* v. *Snow*, 5 Mass., 547.

It is submitted that the ruling of the trial court in admitting in evidence the liber copy of the certificate of incorporation was correct, the proper foundation having been laid by evidence tending to prove the loss of the original certificate, and the copy being properly proved.

Conceding, however, only for the sake of the argument, that the court erred in admitting this copy in evidence, this error was not prejudicial to the defendant because the *de facto* existence of the corporation was subsequently fully shown.

The existence of the corporation having been shown, the burden of proof of showing its dissolution is on the defendant.

> *Electric Light Co.* v. *Leiter*, 19 D. C., 575 (1887).

In the same case it is held:

> A corporation is dissolved neither by its failure to elect trustees nor by its insolvency; in either case it may still sue and be sued; it loses its franchise only by a surrender by the shareholders or through forfeiture by the State in a suit instituted for that purpose.

In *Morrow* v. *Edwards*, 20 D. C., 475, the court said (pp. 477–8):

> This court has no power to dissolve a corporation. The sovereign power alone can do that. The Attorney-General of the United States can by proper proceedings inquire into the legality of the incorporation where the acts are said to be such as to forfeit the right to a continuance of the charter.

The Court of Appeals held in the case of *Brown* v. *Cement Co.*, 1 App. D. C., 232:

> The authorities are practically unanimous to the effect that a corporation does not lose its franchise or become legally dissolved by discontinuing its business, ceasing to main-

tain an office or to elect officers, or by becoming hopelessly insolvent.

See also *Weightman* v. *Critic Co.*, 4 App. D. C., 136.

A corporation is not dissolved by the fact that from failure to elect, or otherwise, the number of trustees becomes reduced to a less number than by charter are empowered to act. Its franchise would only be suspended until restored by legislative action.

Vincennes University v. *Indiana*, 14 Howard, 268;

Taylor v. *Bowker*, 111 U. S., 110;

First National Bank of Bethel v. *National Pahquioque Bank*, 14 Wallace, 383.

Although a corporation has ceased the prosecution of the object for which it was organized, its corporate powers remain unimpaired for the collection of debts, the enforcement of liabilities, and the payment of creditors.

Glenn v. Liggett, 134 U. S., 533.

The ways in which a corporation may be dissolved are clearly set out in the tenth volume of the Cyclopedia of Law and Procedure at page 1270; and the fact that a corporation is not dissolved by neglecting to exercise its corporate powers, omission to elect officers, ceasing business, making an assignment of all its property, the sale or disposal of all its property, or insolvency is clearly shown in the same work at pages 1294 and 1295 and the cases there cited.

In the same work, at page 1298, the following important doctrine is laid down:

> It has not escaped the observation of capable judges that the dissolution of a corporation sometimes means an annulment of its franchises or a termination of its existence, and sometimes a mere judicial act which alienates its property and suspends its business without terminating its existence; so that the corporation may, for certain purposes, be considered as dissolved so far as to be incapable of doing injury to the public, while it yet retains vitality so far as is essential for the protection of rights of others.

Citing *In re* Independent Insurance Co., 13 Fed. Cases, 7017.

If a corporation can be sued, it is not dissolved.

Ib., page 1334 and cases cited.

Ib., pages 1302 and 1303.

A corporation does not become dormant because a single individual becomes sole owner of the corporate property and franchises by a purchase of the stock.

Newton Co. v. *White*, 42 Ga., 148.

It is to be observed that the defendant made little, if any, attempt to prove that the corporation was dissolved, and that his only witness on this point, Mr. Edson (p. 54), strengthens the evidence already offered by the Government to prove *de facto* existence.

The plaintiff in error argued below that the auditor and Justice Cox having decided in the equity case that the corporation was dissolved, and the

Court of Appeals having affirmed those decisions, the doctrine of *stare decisis* applied, and that court must therefore adhere to its former decisions and hold in the case at bar, on the strength of the former adjudications, that the corporation was dissolved.

The doctrine of *stare decisis* applies not to findings of fact, but to the construction and interpretation of law.

Furthermore, there was no evidence before the jury concerning the decision of the auditor, of Justice Cox, or of the Court of Appeals.

It clearly appears in the record that the second clause of the decree of Justice Cox of June 27, 1896 (Rec., p. 33), was not admitted in evidence, but was kept out of the case by the defendant's objection (p. 45); that that portion of the auditor's report of July 31, 1900 (pp. 35–36), relating to this feature of the case was not received in evidence, but only Schedule A of said report, relating to the account of the receivers (pp. 36, 45, 46, 65); that the opinions of Justice Cox and of the Court of Appeals were not offered in evidence (p. 52).

The findings of fact in the equity case, whatever they may be, were based upon evidence received in that case. The findings of fact in the case at bar are based upon the evidence submitted to the jury.

Furthermore, as above pointed out, a corporation may apparently be dissolved for some purposes and yet retain its full corporate vigor for other purposes.

In this case the plaintiff in error will not be heard to deny the existence of the association.

> 3. One who has acted as secretary of a society can not deny the existence of such society when prosecuted for a fraudulent breach of his trust (syllabus).
>
> *State* v. *Butler*, 21 S. C., 353.

In the last-cited case the court said at page 355:

> Upon the second question the circuit judge charged that if the jury, from the testimony, came to the conclusion that the defendant acted as the secretary of the order named, it would be too late for him to say now that there was no such society, but it was a question for the jury whether the defendant was the secretary of such society. This was in accordance with the case of *State* v. *Sellers*, 7 Rich., 368, where it was held that an officer who had assumed the duties of an office could not himself dispute the validity of his own appointment, even when proceeded against *criminaliter*.

"It may be remarked, also," says the court below, "that the defendant who held the money by appointment as receiver in the equity suit which recognized the corporation as one *de facto*, at least, and under a decree declaring its ownership of that money for the purposes of the suit, is in no attitude to deny its *de facto* status."

OWNERSHIP OF THE EMBEZZLED FUND.

In view of the abundance of evidence in the record proving that the real estate, and the money into

which it was converted, belonged to the Washington Beneficial Endowment Association, which evidence includes the defendant's admissions in his reports as receiver, and his answer in equity cause No. 16072, it seems only necessary to point out some of the fallacies in the argument of the plaintiff in error that this property ceased to belong to the said association.

It is argued that the said association deeded the real estate to the Commercial Alliance Life Insurance Company on August 9, 1894, and that, inasmuch as the court below instructed the jury "that the first paragraph of the decree of the 27th of June, 1896, revested no title to the real estate that was sold by the receivers, or to the proceeds thereof, in the Washington Beneficial Endowment Association," therefore the endowment association had, thereafter, no title to the property. The instruction was correct; yet the endowment association did own the property. The decree revested no title, for the simple reason that title had never passed from the association.

The bill in equity cause No. 15907 alleged that the deed was obtained by fraud, and prayed "that a decree may be passed annulling the transfer of plaintiff to the defendant of all its property and the deed of its real estate as aforesaid and the same reconveyed by the court to the plaintiff."

The court did not order a reconveyance, but decreed that the said deed "be, and the same hereby is, set aside and held for naught." In other words, there never had been any deed, and the endowment association never had parted with the property.

When, then, did it part with the property? The record fails to answer. It is to be remembered, as pointed out above, that neither the second clause of Justice Cox's decree of June 27, 1896, nor his opinion, nor that portion of the auditor's report of July 31, 1900, relating to ownership, was received in evidence. And most of the argument of the plaintiff in error as to ownership is based upon the unwarranted assumption that this record evidence went to the jury.

And, after all, is the defendant to be heard to deny the ownership in the endowment association, even though third persons—creditors and others—might eventually have a better claim than the association to the property?

Wharton, in his Criminal Law (8th Ed.), says:

> SEC. 1025. It has been held that the servant can not, as is elsewhere seen, defend himself on the ground that his employer is not entitled in law to receive the money embezzled. For if, as between the master and servant, the servant holds the money of the master, the question whether the master could have claimed the money from a third party is irrelevant.

Citing:

Campbell v. *State*, 35 Ohio St., 70.
Waterman v. *State*, 116 Ind., 51.

And again Wharton says:

> SEC. 1038. It is no defense that the principals have no right, as against third parties, to the money which the servant embezzles.

Citing: *Com.* v. *Cooper*, 130 Mass., 285.

VARIOUS EXCEPTIONS TO ADMISSIBILITY OF EVIDENCE.

Some of the exceptions taken to the action of the trial court in admitting documentary evidence, including court papers, receivers' reports, bank accounts, checks, and so forth, are based on the ground either that they relate to property in possession before the Code went into effect or that they relate to matters which happened after the date alleged in the indictment.

The first question is cognate to the question raised in the demurrer, and is discussed under application of the statute.

The second question has no place here, for the reason that it is well settled that an offense need not be proved to have been committed on the day named in an indictment, but may be proved as of any day within three years immediately preceding the filing of the indictment.

All this evidence is clearly competent and relevant for the purpose of tracing this property through its various forms and through its various investments, from the time of its receipt by the receivers to the time of its dissipation or conversion.

The motion to strike out the testimony of Dr. Young in reference to two certain checks of June 28, 1895, for the proceeds of sale of real estate was properly overruled, the checks having been admitted without objection by the defendant (Rec., p. 38), and being both competent and relevant to trace the property.

Book No. 1, "Acts of Incorporation," was properly allowed to be identified in connection with Book No. 2, as showing when the recording of certificates of incorporation was begun under the incorporation law of 1870.

There was no possible prejudice to the rights of the defendant by the admitting of this book.

The deeds of real estate to the Endowment Association, and from the Endowment Association to the Commercial Alliance Life Insurance Company, were competent and relevant in connection with the evidence showing that the Endowment Association had possession of, and held and occupied in its corporate name, the real estate described in the said deeds; and the first clause of the decree of June 27, 1896, was then competent and relevant to show that the title to said property did not pass out of the Endowment Association by the deed to the insurance company.

The order of distribution of May 5, 1904, was clearly competent and relevant as evidence tending to prove conversion, especially when taken in connection with the testimony of the witnesses, Robinson and Padgett (p. 53), that the distribution had not been made by the receivers as ordered by the court in this final decree ordering distribution.

The bill in equity and other papers in equity cause 16072 were relevant as proving the defendant to have been not only receiver, but an actual party defendant in the consolidated cases, and also because they

proved admissions made by the defendant of his receivership and of his receipt and possession of the property described in the indictment.

EXCEPTION AS TO REFUSING DEFENDANT'S PRAYERS AS A SERIES.

The trial court was clearly right in refusing to consider the twenty-seven prayers submitted by the defendant as a series at the close of the testimony.

The record at page 57 and at the bottom of page 58 clearly shows that these prayers were submitted as a series, fastened together and numbered from 1 to 27. It is well settled in this jurisdiction that prayers offered as a series are properly refused.

U. S. v. *McBride*, 7 Mackey, 371.

Birmingham v. *Petit*, 21 D. C., 209.

A general exception taken to the refusal of a series of instructions will not be considered if any one of the propositions is unsound.

Union P. R. Co. v. *Callaghan*, 161 U. S., 91.

Furthermore, the record affirmatively shows that each of the twenty-seven prayers was subsequently separately offered to the court and passed upon, except as to four of them which were expressly abandoned by the defendant (p. 57).

EXCEPTIONS AS TO REFUSAL TO GRANT INSTRUCTIONS.

The first prayer of the defendant to instruct the jury upon the evidence to return a verdict of not guilty can not properly be considered by this court for the reason, above pointed out, that the bill of exceptions does not contain the substance of the evidence.

Waiving this fact, merely for the sake of the argument, the instruction was properly refused because even the incomplete bill of exceptions in the present record contains sufficient evidence to show that every essential allegation of the indictment was proved, as appears from the statement of facts set out above and the finding of facts by the court of appeals from the testimony in the bill of exceptions (Rec., p. 82).

This also applies to the refusal of the court to grant the fourth prayer asking for an instruction to the jury to return a verdict of not guilty on the third count.

The refusal to grant the fifth prayer asking for an instruction of acquittal on the sixth count was properly refused, and it is to be noted that the court subsequently, in its general charge, withdrew the sixth count from the consideration of the jury.

The ruling of the court upon the sixth instruction concerning property coming into the defendant's possession before the Code went into effect raises the questions already discussed under the demurrer.

The modification by the court of the defendant's seventh prayer for instruction was unquestionably correct, inasmuch as at the time the instruction was given only two and not four counts were before the jury.

The court was correct in refusing to grant the defendant's seventeenth prayer, which requested the court to instruct the jury upon conflicting presumptions and to charge that the presumption of innocence was stronger than and overcomes any presumption

of the continuance of the life or existence of any person or corporation named in the indictment, etc.

There being no question raised in the case of any presumption except of innocence and good character, this instruction, if granted, could only operate to mislead and confuse the jury. No question of other presumptions went to the jury.

Reference to the general charge of the court at page 69 shows that the court fully instructed the jury upon the presumption of innocence.

The action of the court in refusing to grant the eighteenth prayer, to the effect that if the jury found that any of the moneys mentioned in the indictment came into defendant's possession after January 1, 1902, they must find, before they could convict, that such moneys were not paid out for legitimate expenses, but were fraudulently converted or appropriated by the defendant to his own use, was correct; because it was not necessary that the jury should find the negative fact that the moneys were not paid out for legitimate expenses. Their finding, if they should so find, that the defendant fraudulently converted the moneys to his own use, would exclude every honest use of the moneys, and this instruction as to a negative finding by the jury could have no effect other than to mislead and confuse them.

The court was correct in refusing to grant the twentieth prayer, that the jury be instructed "that * * * they may find the defendant not guilty on the two counts of the indictment, and they must find him not guilty on at least one," because such

instruction could only mislead the jury. The court did give the following instruction in lieu of that offered by the defendant:

> The jury are instructed that upon the evidence in this case they can not find the defendant guilty on both of the counts which are submitted to them.

As above pointed out, the court subsequently instructed the jury to acquit on one of said two counts.

The court was correct in refusing the twenty-second prayer for instruction concerning flight, for the reason that the third instruction of the Government, already granted (Rec., p. 57), was a correct instruction upon this subject. Furthermore, the court very fully instructed the jury upon the question of flight in its general charge (Rec., pp. 68 and 69).

INSTRUCTION AS TO CHARACTER.

The court did not err in refusing the twenty-fifth prayer for instructions (Rec., p. 63), as follows:

> The jury are instructed in this case that the law presumes the defendant to be an upright, honest man, of integrity and good character, and they are bound to assume him to be such a man in their consideration of the evidence.

The case of *Mullen* v. *United States*, 106 Fed., 892, is cited in support of the doctrine that in a criminal trial in a Federal court, where no testimony has been offered as to the previous character of the accused, a presumption of good character exists in his favor, of which, upon a request therefor, the jury should be instructed.

This court said in the case of *White* v. *United States*, 164 U. S., 100, 105:

> When the court told the jury it was admitted that the defendant was a man of good character, and that the jury might consider such good character and give such weight to it as they saw proper under all the evidence in the case, and that the defendant was entitled to a reasonable doubt, it was sufficient, *although the court unnecessarily added that the law presumed every defendcnt to have a good character.*

This prayer, however, requests the court not merely to charge the jury that the law presumes a man to be a man of good character, but to charge the jury that the law presumes the defendant to be an upright, honest man of integrity, and to further instruct the jury that they are "bound to assume" him to be such in their consideration of the evidence.

The instruction is also faulty, because it does not limit the operation of the presumption of good character.

It is confidently asserted that no authority can be brought forward to sustain such an instruction or one even approaching it or to sustain any such supposed doctrine of law.

The court was correct in refusing the twenty-seventh prayer of the defendant to instruct the jury that if they believed that any part of the sums of money were delivered by the defendant to his co-receiver, then, as matter of law, the defendant is not guilty as to the money so delivered, for the reason

that the instruction does not pretend to define the manner of the delivery of such moneys to the co-receiver, if there was any such delivery. Such delivery might in itself have amounted to a fraudulent conversion or embezzlement.

Finally, it is submitted that upon the defendant's prayers, as granted in connection with the prayers of the Government, and the general charge of the court, the jury had a full, fair, and correct exposition of the law relating to the facts of this case.

A careful reading of the charge of the court, beginning at page 65, shows that the court was particularly careful to give a fair and impartial charge and to give the defendant every possible benefit.

EXCEPTION AS TO PROOF OF QUALIFICATION OF RECEIVER.

The plaintiff in error attempts to assign as error the failure of the prosecution to produce and prove the bond of the receiver, or his qualification otherwise.

This question was not raised below except in the motion for a new trial, which is not reviewable.

The record shows clearly, however, that the defendant assumed and exercised the duties of the office of receiver.

He is now estopped from attempting to deny the validity of his appointment or qualification.

> An officer who has assumed the duties of the office can not himself dispute the validity of his own appointment, even where he is proceeded against *criminaliter*.
>
> *State* v. *Sellers*, 7 Rich. (S. C.), 368.

REFUSAL TO REQUIRE ELECTION.

The defendant moved the court to require the Government to elect on which of the two (No. 3 and No. 6) remaining counts it would go to the jury, and excepted to the ruling of the court denying the motion.

This ruling of the court is not reviewable.

It is within the discretion of the court to direct the prosecution to elect upon which count of an indictment it will proceed, and its action in that regard can not be assigned for error.

U. S. v. *McBride,* 18 D. C., 371.

But subsequently, after argument, the court charged the jury that there was no evidence in the case justifying a verdict of guilty on the sixth count, and withdrew that count from the jury, leaving only the third count (p. 66). Subsequently a verdict of not guilty was taken on the sixth count.

MISCONDUCT OF PROSECUTORS.

A number of alleged acts of misconduct on the part of the prosecuting attorney and his assistant are assigned as error.

The incomplete nature of the bill of exceptions, as pointed out above, makes it impossible to show why all the statements made in argument to the jury were justified by the evidence.

It is objected that the plaintiff in error was called "a common thief."

If the evidence in the case was sufficient to justify his conviction of embezzlement it certainly justified

the application to him of the epithet "thief," which means: One who steals, especially one who steals furtively, without violence. One who practices overreaching, deceit, etc.

The statement to the jury that the plaintiff in error was depositing funds to his private account and had been guilty of forgery applied not to matters extraneous to the prosecution, but to testimony in the case. It is apparent from the bill of exceptions that these charges were predicated upon the testimony of Eckloff, but, as above pointed out, the testimony of Eckloff is not attempted to be given in the bill of exceptions.

The objectionable argument that defendant did not even try to prove a good reputation was promptly withdrawn upon objection, as was the statement comparing defendant's counsel to phonographs.

It is easy to pick out isolated phrases from long arguments and make them appear in an entirely different light from the reality.

> Alleged misconduct of counsel in the course of argument to the jury is not proper subject of exception except in extraordinary cases, where prejudice is the manifest object of the speaker, and never where the remarks objected to have been withdrawn.
>
> *R. R. Co.* v. *Dashiell*, 7 App. D. C., 507.
> *R. R. Co.* v. *Patterson*, 9 App. D. C., 423.
> See also *Lorenz* v. *U. S.*, 24 App. D. C., 337, 391.
> *Yeager* v. *U. S.*, 16 App. D. C., 356, 362.
> *State* v. *Gartrell*, 171 Mo., 489, 512.

THE JUDGMENT.

The judgment of the trial court is attacked upon two grounds: First, because it included labor in the punishment, and, secondly, because it omitted forfeiture.

It may be said that even if the judgment were erroneous in either of these respects the plaintiff in error would not on that account be entitled to a new trial, but that the errors could be corrected or the case remanded to the trial court with instructions to amend. (*Raymond* v. *United States*, 25 App. D. C., 555; *In re* Bonner, 151 U. S., 242.)

The Court of Appeals found that the trial court was not justified in adding the words "at hard labor," but, having the power to modify as well as reverse a judgment of the Supreme Court of the District of Columbia, modified the judgment by striking out the words "at labor" as being mere matter of surplusage. (R. S., 5539 and 5546; *Ex parte* Karstendick, 93 U. S., 396, 399; *In re* Mills, 135 U. S., 263, 266.)

In disposing of the claim that the judgment should have included the forfeiture provided by the statute, the Court of Appeals said:

> While section 841 declares a forfeiture of a receiver's commissions and charges in cases of embezzlement of the funds in his possession, it is not a part of the punishment which the court, having jurisdiction of the offense, is authorized to impose, and it was properly omitted in entering the judgment upon the verdict and fixing the penalty. If effective,

> the question of the forfeiture is for the determination of the Equity Court having jurisdiction in the matter of the receivership when the accounts thereof come on for final settlement. (Rec., p. 84.)

Even if the judgment should have included the forfeiture provided by the statute the plaintiff in error can not complain of the omission.

The rule is laid down in 19 Encyclopedia of Pleading and Practice, pages 483 and 484, that where a statute provides that forfeiture shall follow conviction for certain offenses, the court may include such a forfeiture, but that a failure to do so is favorable to the defendant and can not be complained of by him.

In 1 Bishop's New Criminal Law, section 931, it is said that if a law provides distinct punishments, sentence to one with the other omitted is not erroneous. (See also Wharton, Criminal Pleading and Practice, sec. 918.)

But the language of the statute does not make forfeiture a part of the punishment. The punishment is by fine or imprisonment, or both. The punishment clause and the forfeiture clause are necessarily severable.

The plaintiff in error endeavors to make it appear (1) that the forfeiture is a necessary part of the judgment, and that its omission renders the judgment void; (2) that the forfeiture clause, having the effect to divest vested rights, makes the statute unconstitutional; and (3) that the conviction and judgment having the effect to deprive him of all right or

claim to commissions, costs, and charges, amounting to more than $5,000, thereby gives this court jurisdiction under its writ of error.

Neither of the above positions can be sustained.

As stated by the Court of Appeals, the question of forfeiture is for the determination of the equity court having jurisdiction in the matter of the receivership.

The false position is assumed by the plaintiff in error that the forfeiture provided by the statute inures to the benefit of the United States.

He says in his brief upon the motion to dismiss the writ of error:

> The law confers no rights upon individuals, but only upon the United States. It does not declare the beneficiary of the forfeiture, and it therefore goes exclusively to the United States that enacted the statute.

The only authority cited by the plaintiff in error is Am. and Eng. Encyc. of Law, vol. 13, p. 69.

The text of the Encyclopedia at the place cited is as follows:

> The only general rule that can be laid down in reference to this matter is that in absence of any constitutional or statutory provision directing otherwise, the proceeds of *fines and penalties* imposed must go to that government, whether national, state, county, or municipal, whose laws or ordinances have been violated by the act or omission of the offender.

Section 841 of the Code provides for the forfeiture of commissions, not only of receivers, but also of

administrators, executors, and other fiduciaries who are guilty of embezzlement.

Irrespective of this statute, the courts have the power to deprive receivers, administrators, executors, and other fiduciaries of their compensation or commissions. "Where a receiver has been guilty of negligence or misconduct in the management of property committed to him, the court may reduce his compensation for such reason, or, if the circumstances warrant, deny him compensation altogether." (23 Am. and Eng. Encyc., 1105; *In re* Sheets Lumber Co., 52 La. Ann., 1337; *In re* Commonwealth F. Ins. Co., 32 Hun. (N. Y.), 78; *Carl* v. *Meyer*, 51 N. Y. Appellate Div., 5.)

"As a rule, where the personal representative unlawfully converts or misappropriates the funds of the estate, or commingles them with his own to the detriment of the estate, he will be denied compensation." (18 Cyc. of Law and Procedure, under the title "Executors and Administrators.")

The forfeiture provided by section 841 clearly is not a forfeiture inuring to the benefit of the United States, but is such a forfeiture as would be enforced by the equity court by refusing to allow to an embezzling receiver the costs, charges, and commissions which would be allowed to an honest receiver.

"To forfeit" has, in this statute, the elemental meaning "to lose."

It might with equal force be argued that section 1180 of the District Code, which provides that "if

any person or corporation shall contract in the District * * * to pay a greater rate than 6 per cent per annum, the creditor shall forfeit the whole of the interest so contracted to be received," gives the United States the right to the interest so forfeited.

But even granting, for the sake of argument, that the forfeiture does inure to the benefit of the United States, the forfeiture would not be enforceable in a criminal action.

The rule is laid down in 19 Cyc. of Law, p. 1359: "It has been said that, if no form of prosecution or of action to enforce a forfeiture imposed by statute has been prescribed, debt will lie when the action is brought by an individual; or, if the Government should be the party plaintiff, an information will lie, upon common-law principles;" citing *Vaughan* v. *Thompson*, 15 Ill., 39.

"A penalty given by a statute can not be recovered in a criminal proceeding." (13 Am. and Eng. Encyc., 64; *Eubanks* v. *Ashley*, 36 Ill., 177; *Fowler* v. *U. S.*, 1 Wash. Ty., 3.)

In all the cases cited by the plaintiff in error upon this point there is involved the construction of customs and internal-revenue statutes which provide for the forfeiture of certain property to the United States.

But the plaintiff in error may argue that if the forfeiture is not properly to be included in the judgment in this case, yet the judgment of conviction, being a finding of the elemental fact of embezzlement,

is conclusive against him, and that the indirect effect of the judgment is the same.

Unless the forfeiture inures to the benefit of the United States the conviction in this case can not in any manner be conclusive against the plaintiff in error.

It is well settled that a verdict is evidence between parties and privies only. (*Cheveront* v. *Textor*, 53 Md., 295; *Wood* v. *Davis*, 7 Cranch, 271; *Davis* v. *Wood*, 1 Wheat., 6; *Wilkes* v. *Dinsman*, 7 How., 89.)

A judgment, to operate as an estoppel or *res judicata* between the parties, must have been entered by a court of competent jurisdiction upon the same subject-matter, between the same parties, and for the same purpose. (*Wash., A. & G. Co.* v. *Sickles*, 24 How., 333; *Same* v. *same*, 5 Wall., 580; *Hopkins* v. *Lee*, 6 Wheat., 109.)

"The persons between whom a judgment or decree in a suit is conclusive in a subsequent suit are the parties to the prior suit and their privies, and as a general rule it is conclusive only between them." (24 Am. and Eng. Encyc. of Law, 724; *New Orleans* v. *Warner*, 175 U. S., 120; *New Orleans* v. *Bank*, 167 U. S., 371; *Ky. Bank* v. *Stone*, 88 Fed., 383, affirmed in 174 U. S., 408, see p. 412).

"It is of the essence of estoppel by judgment that it is certain that the precise fact was determined by the former judgment." (*De Sollar* v. *Hanscome*, 158 U. S., 216, syllabus.)

"It is undoubtedly settled law that a judgment of

a court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former suit." (*Russell* v. *Place*, 94 U. S., 606.)

In the case of *Coffey* v. *United States* (116 U. S., 436), cited by the plaintiff in error, it was held that a judgment of acquittal on a criminal charge is conclusive in favor of the claimant to property sought to be forfeited. This case was one of an information *in rem* for violation of sections 3257, 3450, and 3453 of the Revised Statutes.

In the Coffey case the question as to whether or not a judgment of conviction in a criminal prosecution is conclusive against the accused as claimant in a subsequent suit *in rem*, to enforce the forfeiture, was left open. In a later case, decided in 1896, the case of *The Three Friends* (166 U. S., 1), the Chief Justice, delivering the opinion of this court, says, at page 49:

> We agree with the district judge that the contention that forfeiture under section 5283 depends upon the conviction of a person or persons for doing the acts denounced is untenable. The suit is a civil suit *in rem* for the condemnation of the vessel only, and is not a criminal prosecution. The two proceedings are wholly independent and pursued in different courts, and the result in each might be

different. Indeed, forfeiture might be decreed if the proof showed the prohibited acts were committed, though lacking as to the identity of the particular person by whom they were committed. (The *Palmyra*, 12 Wheat., 1, 14; The *Ambrose Light*, 25 Fed. Rep., 408; The *Meteor*, 17 Fed. Cas., 178.)

The *Palmyra* was a case of a libel of information against the vessel to forfeit her for a piratical aggression under certain acts of Congress which made no provision for the personal punishment of the offenders, but it was held, that, even if such provision had been made, conviction would not have been necessary to the enforcement of the forfeiture. And Mr. Justice Story, delivering the opinion, said:

"It is well known, that at the common law, in many cases of felonies, the party forfeited his goods and chattels to the Crown. The forfeiture did not, strictly speaking, attach *in rem;* but it was a part, or at least a consequence, of the judgment of conviction. It is plain from this statement that no right to the goods and chattels of the felon could be acquired by the Crown by the mere commission of the offense, but the right attached only by the conviction of the offender. The necessary result was that in every case where the Crown sought to recover such goods and chattels it was indispensable to establish its right by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested until the conviction. But this doctrine never was

applied to seizures and forfeitures, created by statute, *in rem*, cognizable on the revenue side of the Exchequer. The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this whether the offense be *malum prohibitum* or *malum in se*. The same principle applies to proceedings *in rem*, on seizures in the Admiralty. Many cases exist, where the forfeiture for acts done attaches solely *in rem*, and there is no accompanying penalty *in personam*. Many cases exist where there is both a forfeiture *in rem* and a personal penalty. But in neither class of cases has it ever been decided that the prosecution were dependent upon each other. But the practice has been and so this court understands the law to be, that the proceeding *in rem* stands independent of, and wholly unaffected by any criminal proceeding *in personam*. (And see *The Malek Adhel*, 2 How. 210; *United States* v. *The Little Charles*, 1 Brock. 347.)"

The case of *United States* v. *Stowell* (133 U. S., 1), cited by the plaintiff in error, was an information for forfeiture of certain property under sections 3258 and 3305 of the Revised Statutes and section 16 of the Code of February 8, 1875 (18 Stats., 310), which provided that certain property "shall be forfeited to the United States."

The case of *United States* v. *Zucker* (161 U. S.,475), cited by plaintiff in error, was an action against importers to recover the value of merchandise alleged to have been forfeited under the customs administrative act of June 10, 1890 (26 Stats., 131–135).

In the case of *Stone* v. *United States* (167 U. S., 178, 186) the Coffey case is approved, as is also the case of *United States* v. *McKee* (4 Dill, 128); the decision in the McKee case being upon the ground "that the defendant can not be twice punished for the same crime, and that the former conviction and judgment was a bar to the suit for the penalty."

The forfeiture was properly omitted from the judgment, which does not, either mediately or immediately, affect the right of the plaintiff in error to commissions.

It is submitted that the writ of error should be dismissed and the petition for certiorari denied; or that, there being no error in the record, the judgment of the Court of Appeals should be affirmed.

HENRY M. HOYT,
Solicitor-General.

JAMES S. EASBY-SMITH,
Special Assistant to the Attorney-General.

MARCH, 1907.

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No. 395.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.

IN ERROR TO THE COURT OF APPEALS, DISTRICT OF COLUMBIA.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1906.

THOMAS M. FIELDS, PLAINTIFF IN ERROR,
v.
THE UNITED STATES.
} No. 395.

MOTION TO ADVANCE.

The plaintiff in error was convicted in the Supreme Court of the District of Columbia at the January term, 1905, of embezzlement. On appeal to the Court of Appeals the judgment was modified and affirmed, and thereupon a writ of error was sued out from this court. On January 21, 1907, a petition for certiorari was submitted, together with a motion by the United States to dismiss, both of which were by the court, on January 28, postponed to the hearing of the case on its merits. The question of the constitutionality of section 841 of the Code of the District of Columbia, under which the indictment was brought, is attempted to be raised.

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In accordance with rule 26, section 3, the Solicitor-General moves the court to advance the case on the docket and set it down for hearing on a day convenient to the court during the present term.

Opposing counsel concur in this motion.

HENRY M. HOYT,
Solicitor-General.

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Supreme Court of the United States.

No. 395.—October Term, 1906.

Thomas M. Fields, Plaintiff in Error, *vs.* The United States. } In error to the Court of Appeals of the District of Columbia.

[April 8, 1907.]

Thomas M. Fields was indicted in the Supreme Court of the District of Columbia at the January term, 1905, for embezzlement. Of eight counts in the indictment seven were disposed of by demurrer or by verdict in favor of the defendant. The trial begun on May 8, and, ending May 15, 1905, resulted in a verdict of guilty under the third count. Motions in arrest of judgment and for a new trial having been overruled, he was sentenced to imprisonment and labor in the penitentiary for five years. The Court of Appeals of the District modified the judgment of the Supreme Court by striking out the order for "labor," and, as so modified, affirmed it. 27 App. D. C. 433. The case was brought to this court on writ of error. A motion to dismiss and a petition for certiorari were presented by the respective parties, the consideration of both of which was postponed to the hearing on the merits. The indictment was found under section 841 of the District Code, which is as follows:

"Any executor, administrator, guardian, trustee, receiver, collector, or other officer into whose possession money, securities, or other property of the property or estate of any other person may come by virtue of his office or employment, who shall fraudulently convert or appropriate the same to his own use, shall forfeit all right or claim to any commissions, costs, and charges thereon, and shall be deemed guilty of embezzlement of the entire amount or value of the money or other property so coming into his possession and converted or appropriated to his own use, and shall be punished by a fine not exceeding one thousand dollars, or by imprisonment not exceeding ten years, or both."

The statute under which the writ of error was sued out is section 233 of the District Code, which reads:

"Sec. 233. Any final judgment or decree of the Court of Appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February

ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

Mr. Justice BREWER delivered the opinion of the Court.

The petition for a certiorari must be first considered. A certiorari can be issued only when a writ of error cannot. 26 Stat. 828, sec. 6, last two paragraphs. There have been two or three instances in which, after a writ of error has been allowed, an application for a certiorari has been filed, the latter because of doubt whether the former would lie. It must not be supposed that because we have before us both a writ of error and an application for certiorari that the rules laid down by this court governing the latter applications are to be ignored, and the case held in this court by either the writ of error or the certiorari.

In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between the decisions of State and Federal courts or between those of Federal courts of different circuits. There is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public.

Will a writ of error lie? Is the case one of which this court has jurisdiction? It is settled that a criminal case, as such, cannot be brought here on writ of error from the Court of Appeals of the District. *Chapman* v. *United States*, 164 U. S. 436, and cases cited in the opinion; *Sinclair* v. *District of Columbia*, 192 U. S. 16.

The authority of these cases is not questioned, but it is contended that the forfeiture of all right or claim to any commissions, etc., was determined by the judgment in the case at bar, and that, therefore, it comes within the pecuniary provisions of section 233. *Smith* v. *Whitney*, 116 U. S. 167, is cited as authority. In that case we sustained our jurisdiction over a judgment of the Supreme Court of the District, dismissing a petition for a writ of prohibition to a court martial convened to try an officer for an offense punishable by dismissal from the service and consequent deprivation of salary, which, during the term of his office, would exceed the sum of $5,000. But that case is very different from this. There the direct result of an adverse judgment of the court martial was the deprivation of an office with a salary of over $5,000. That sum, therefore, was involved in the trial sought to be restrained. But no such result follows in this case.

The act of the defendant in fraudulently converting or appropriating the moneys in his possession operates to forfeit all right or claim to any commissions, etc., and this, irrespective of the question whether he is or is not convicted of any crime in respect thereto. It is true such fraudulent conversion or appropriation is declared to be embezzlement, and the defendant was prosecuted and convicted of that offense, but the forfeiture of commissions does not follow the judgment, but follows the wrongful conversion or appropriation of the moneys. The only direct pecuniary result of a conviction is a fine not exceeding $1,000, and that as a punishment for the offense. *United States* v. *More*, 3 Cranch, 159, 174. It adjudges no forfeiture of commissions. It may be that it furnishes evidence in respect to the forfeiture of commissions, but if so it is simply evidence. Nor does the criminal offense depend at all upon the amount of the appropriation. If the official fraudulently converts or appropriates $1,000 the crime is the same as though he fraudulently converts or appropriates $50,000. All that can be accomplished by the criminal prosecution is the statutory punishment for the offense, which cannot exceed a fine of $1,000, or imprisonment for ten years, or both. The conviction is conclusive as to the fact of a fraudulent conversion and appropriation but not as to the amount thereof any more than a conviction of larceny is a conclusive adjudication that the larceny was committed at a day named or of the precise amount or value of the property charged to have been stolen. Those are incidental and minor facts, which may or may not be proved exactly as stated. All that is necessary to sustain the judgment before us is that there was a fraudulent conversion or appropriation of some amount of money in the possession of the official. For these reasons the writ of error cannot be sustained.

The application for a certiorari is denied and the writ of error is

Dismissed.

Mr. Justice WHITE concurred in the judgment.

True copy.

Test:

Clerk Supreme Court, U. S.